Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

PAUL ANTHONY RANGOLAN,

Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL,

Respondent.

On Petition for A Writ of Certiorari To the United States Court of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Court of Appeals may issue a stay of removal only if the petitioner meets the standard for issuance of an injunction contained in 8 U.S.C. 1252(f)(2): a showing "by clear and convincing evidence that the entry or execution of [the removal] order is prohibited as a matter of law." 8 U.S.C. 1252(f)(2).

2. Whether the reference in 8 U.S.C. 1252(a)(2)(D) to "questions of law" encompasses claims involving the application of law to fact. In particular, whether a challenge to the Board of Immigration Appeal's "more likely than not" determination raises a "question[] of law" within the meaning of § 1252(a)(2)(D), or instead raises only a factual claim that does not fall within that provision and strips the Courts of Appeals of jurisdiction to review Board decisions.

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OPINION BELOW

The Fourth Circuit Court of Appeals did not select its opinion for publication in the Federal Reporter. The decision is currently not reported in Westlaw. The pertinent rulings are reprinted in the Appendix at A and D.

JURISDICTION

The Fourth Circuit filed its decision on October 23, 2007 and entered an order denying petitioner's motion for rehearing on November 21, 2007. This Court granted petitioner until March 11, 2008 to file a petition for a writ of *certiorari*. This Court has jurisdiction under 8 U.S.C. § 1252(a)(1) to review the Circuit Court's decision on a writ of *certiorari*.

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1252(a)(2)(D)

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. § 1252(f)(2)

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

STATEMENT OF FACTS

The petitioner, Paul Anthony Rangolan, is a native and citizen of Jamaica who became a lawful permanent resident of the United States in 1984. In January 1999, the U.S. Department of Homeland Security ("DHS") executed an order of removal against petitioner and deported him to Jamaica based on a finding that he had committed an aggravated felony offense, conviction for embezzlement of funds as a bank employee. He reentered the United States in March 1999 after being persecuted for being a homosexual in Jamaica. The Government conducted an interview regarding petitioner's claim of persecution on December 14, 2006 and found that he had established a reasonable fear of return to Jamaica. App. G.

On February 16, 2007 and March 6, 2007, the petitioner, Paul Anthony Rangolan, presented testimony from his two United States citizen sisters

and himself in support of the documentary record containing his application for relief from removal pursuant to Article 3 of the Convention Against Torture. On March 6, 2007, Immigration Judge Wayne R. Iskra found as follows:

> Therefore, it is the opinion of the Court with respect to the main issue in this case, whether or not the respondent is a homosexual, that he has met his burden to prove that he is a homosexual. With respect to a nexus between the respondent being a homosexual and his application for relief under the provisions of Section 241(b)(3) withholding of removal, it is the opinion of the Court that the respondent is a member of a particular social group, and the case cited by the Government attorney wo· ld be the applicable case, *Matter of Toboso-Alfonso*, Int. Dec. 3222. That case has held that an applicant who had the status of being a homosexual both established his membership in a particular social group and demonstrated that his freedom was threatened within the meaning of the Act. So it is the opinion of the Court that the respondent is a member of a particular social group.
>
> * * *
>
> With respect to deferral of removal, it is the opinion of the Court that the respondent has met his burden to prove that it would be more likely than not that he

would suffer torture if removed to Jamaica. I have taken into consideration the background documents submitted by the respondent in the nature of articles, but most importantly the Country Reports for Human Rights Practices published by the State Department on March 8, 2006. That report states that the offenses against the person's act prohibit acts of gross indecency, generally interpreted to be any kind of physical intimacy between men in public or in private, which are punishable by ten years in prison. Although Prime Minister Patterson stated that the country would not be pressured to changes its antihomosexual [sic] laws, in October a parliamentary committee met and proposed a debate on that issue. The report also goes on to list individuals who were homosexuals who were killed, and also that in December a homophobic mob allegedly chased a homosexual off a pier where he drowned.

I have also taken into consideration the fact that I did find credible that the respondent was chased and beaten by an antihomosexual [sic] mob and that he would have no recourse to the government of Jamaica. I have also taken into consideration, with respect to the State Department Report section on torture, that although the law prohibits such practices, reports of physical abuse of prisoners by guards continued despite efforts of the government to remove abusive guards and

> improve procedures. This lists instances where individuals who are apprehended and detained are tortured. It is the opinion of the Court that if the respondent were returned to Jamaica that it would be more likely than not based upon his history as being a homosexual that he would commit homosexual acts and would be subject to imprisonment for that act and tortured.

App. C; Administrative Record ("A.R.") at 93-102.

In support of his applications for relief from removal, the petitioner submitted a letter from the Jamaican Embassy in Washington, D.C. that states clearly that the only way Mr. Rangolan can live in Jamaica is if he "conceal[s] [his] sexual body language to prevent future assault" and that he should be aware that homosexual acts are considered criminal in the eyes of Jamaican law. App. F; A.R. at 308.

Other documents submitted by Mr. Rangolan reveal that, even when confronted by murder of homosexuals, the government of Jamaica is loathe to prosecute or even investigate such an act. The Human Rights Watch Report of November 2004, entitled "Hated to Death: Homophobia, Violence and Jamaica's HIV/AIDS Epidemic" clearly states the situation for homosexuals and persons with HIV/AIDS in Jamaica. A.R. at 316-396. Human Rights Watch found that "[p]olice not only harass and persecute people suspected of homosexual conduct, sex workers, and people living with

HIV/AIDS. They also interfere with HIV/AIDS outreach to them." A.R. at 334. Regarding the issue of torture at the hands of and with the acquiescence of government officials, Human Rights Watch reported that "police participated in the abuse that ultimately led to this mob killing, first beating the man with batons and then urging others to beat him because he was homosexual." A.R. at 335. Human Rights Watch also noted that "[p]olice abuse is a fact of life for many men who have sex with men and women who have sex with women in all of the communities that Human Rights Watch visited in Jamaica. As in the incident described above, homophobic police violence can be a catalyst for violence and abuse by others." A.R. at 336.

Human Rights Watch noted that the "[d]iscriminatory police practices, fear that their homosexuality might be publicized, the paucity of available legal assistance, and the possibility of being prosecuted themselves combine to keep men who have sex with men from filing complaints or seeking redress when they are victims of extortion." A.R. at 342-43. The report notes that a "number of witnesses said that they thought that some element of their outward behavior, dress, or appearance was the motivation for police to arrest or detain them." A.R. at 341. The Human Rights Watch Report notes that even the "Police Public Complaints Authority, the independent state authority charged with investigating allegations of police abuse" refuse to investigate allegations of police abuse of homosexuals. A.R. at 345.

The study by Ruth C. White published in Culture, Health & Sexuality, dated July 4, 2005, entitled "Homosexuality and HIV/AIDS stigma in Jamaica," notes that "[s]exuality-based oppression in Jamaica is institutionalized throughout the legal system, health and social welfare institutions, popular media and culture, and, through extreme social stigma." A.R. at 399. Indeed, the article notes that the "Jamaican government has **overtly sanctioned homophobia by including homophobic messages in their year-2002 political campaigns.**" *Id.* (Emphasis supplied).

On April 5, 2007, the DHS filed an appeal from the Immigration Court's decision, stating that the Immigration Court erred in granting deferral of removal "as it was based upon nothing more than respondent allegedly being homosexual." A.R. at 86-88. On April 12, 2007, Mr. Rangolan, through undersigned counsel, filed a motion to summarily dismiss the DHS appeal as failing to comply with the regulations governing such filing. A.R. at 67-72.

In an appeal brief filed after an extension of the briefing schedule before the BIA, the DHS raised a new issue, claiming that Petition failed to sustain his burden to demonstrate that it was more likely than not that he would be tortured as a homosexual upon return to Jamaica and claiming that the Immigration Court's finding that he had done so was based on pure speculation and not on anything substantive in the Record of Proceedings. A.R. at 16-37. The Board of Immigration Appeals ("BIA") adopted the rationale in the DHS brief in

sustaining the Government's appeal, reversing the grant of deferral of removal to Jamaica, and ordering Petitioner's removal from the United States to Jamaica. App. B.

The Fourth Circuit, in an order dated October 23, 2007, granted the Government's motion to dismiss on jurisdictional grounds. App. A. The Government argued that whether the facts of petitioner's case satisfy the legal standard for deferral of removal (the "more likely than not" standard) raised only a factual claim, and thus does not fall within the Fourth Circuit's renewed petition-for-review jurisdiction over "questions of law." *See* 8 U.S.C. § 1252(a)(2)(D). The Government's position is contrary to the decisions of several Circuits which have held that claims involving the application of law to fact such as Petitioner's present reviewable questions of law. *See infra*, at I. The issue is one of far-reaching importance regarding the jurisdiction of the federal courts and arises in an area with life and death consequences for petitioners seeking CAT relief.

The Fourth Circuit also denied the petitioner a stay after it granted the Government's jurisdictional motion. The Government argued that the proper standard for a stay is the heightened standard set forth in 8 U.S.C. § 1252(f)(2). With the exception of the Eleventh Circuit, every Circuit Court to address the question regarding the proper standard for a stay in removal cases (eight circuits to date) has rejected the Government's position that the heightened standard in § 1252(f)(2) applies. *See*

infra, at I. There is no question that the petitioner satisfies the traditional standard for a stay, given that he raises a novel jurisdictional question on which the majority of Circuit Courts have rejected the Government's position. Moreover, the Immigration Court granted Petitioner relief in accordance with the Convention Against Torture, the BIA overturned the IJ decision in a perfunctory manner, and the balance of hardships clearly favors Petitioner in this case which involves his possible death at the hands of agents of the government of Jamaica. This is critical given the fact that only four months after the BIA, on August 16, 2007, overturned the IJ decision that the petitioner faced torture on return to Jamaica based on his homosexuality, on December 18, 2007, the BIA, with two of the same panel members, found that public officials in Jamaica clearly target homosexuals for persecution and police refused to intervene or investigate abuse of homosexuals because such persons are considered *persona non grata* in Jamaica and unworthy of protection. App. E.

It is noteworthy that both in the order of October 23, 2007 denying the motion for stay and dismissing the petition for review, as well as the order of November 21, 2007 denying the petition for rehearing and emergency motion for stay, Judge Gregory dissented from the decision and indicated, without opinion, that he would grant the motion for stay, the motion for rehearing, and deny the Government's motion to dismiss the petition for review. App. A, D. Clearly, Judge Gregory found that the Fourth Circuit had jurisdiction to consider

the petition for review and found that Petitioner's case warranted a stay of removal pending a decision in the case on its merits.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHAT STANDARD IS REQUIRED FOR ISSUANCE OF A STAY OF REMOVAL PENDING A DECISION ON A PETITION FOR REVIEW.

The circuit courts have overwhelmingly rejected the Government's position that 8 U.S.C. § 1252(f)(2) provides the proper standard for a stay of removal. Without clarification of the appropriate stay standard, Petitioner, and others like him, may be wrongly denied stays of removal and removed to countries where they will face serious injury or even death.

Eight out of the nine circuit courts to consider this issue have squarely rejected the Government's position that a court of appeals may issue a stay of removal only if the petitioner meets the standard for issuance of an injunction contained in 8 U.S.C. § 1252(f): a showing "by clear and convincing evidence that the entry or execution of [the removal] order is prohibited as a matter of law." 8 U.S.C. § 1252(f). *Compare Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003); *Mohammad v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002); *Douglas v. Ashcroft*, 374 F.3d 230, 234

(3d Cir. 2004); *Tesfamichael v. Gonzales*, 411 F.3d 169, 172-76 (5th Cir. 2005); *Bejjani v. INS*, 271 F.3d 670, 688-89 (6th Cir. 2001); *Hor v. Gonzales*, 400 F.3d 482, 485 (7th Cir. 2005); *Lim v. Ashcroft*, 375 F.3d 1011, 1012 (10th Cir. 2004); *Andrieu v. Ashcroft*, 253 F.3d 477, 482 (9th Cir. 2001) (en banc) *with Weng v. U.S. Att'y General*, 287 F.3d 1335, 1337-38 (11th Cir. 2002). *See also Bonhomme-Ardouin v. U.S. Att'y General*, 291 F.3d 1289, 1290 (11th Cir. 2002) (Barkett, J., concurring) (calling for *en banc* reconsideration of *Weng*).

As Judge Easterbrook recognized in *Hor v. Gonzales*, 400 F.3d 482 (7th Cir. 2005), the Government's argument that § 1252(f) supplies the correct standard for stay requests is supported neither by the statutory language nor by common sense. He emphasized that there is a "long-standing distinction" between a "stay" and an "injunction" that is uniformly reflected not only in the U.S. Code and the Federal Rules of Appellate Procedure but specifically in 8 U.S.C. § 1252. *Hor*, 400 F.3d at 484, 485.

Neither does the heightened § 1252(f) standard urged by the Government make sense as a practical matter, for many petitioners facing persecution or torture who ultimately prevail on the merits would have their stay requests denied under that standard. Although such aliens could continue to litigate their petitions for review from abroad, "[t]he ability to come back to the United States would not be worth much if the alien has been maimed or murdered in the interim. Yet under the Attorney General's reading of § 1252(f) an alien who

is likely to prevail in this Court, and likely to face serious injury or death if removed, is not entitled to remain in this nation while the Court resolves the dispute." *Id.* at 485.

II. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS WHETHER A CHALLENGE TO THE DECISION BY THE BIA ABOUT THE LIKELIHOOD OF TORTURE IS A QUESTION OF LAW OR IS ONLY A FACTUAL CLAIM THAT IS OUTSIDE THEIR JURISDICTION FOR CRIMINAL ALIENS THAT ARE ONLY ELIGIBLE FOR DEFERRAL OF REMOVAL.

In *INS v. St. Cyr*, 533 U.S. 289 (2001), the Supreme Court engaged in a lengthy historical analysis of habeas corpus and, based on that analysis, concluded that the Suspension Clause "required" review of deportation orders. *Id.* at 300. Most important to the case at bar, the Court made clear that habeas review in the executive detention context encompassed not only claims regarding the proper "interpretation" of statutes, but also claims regarding the "application" of statutes. *Id.* at 302. *See Ramadan v. Gonzales*, 479 F.3d 646, 652 (9th Cir. 2007); *Chen v. Dep't of Justice*, 471 F.3d 315, 327-28 (2d Cir. 2006). *See also* Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. Sch. L. Rev. 133, 139-42 (2006) (to avoid constitutional concerns, the REAL ID Act should be construed to preserve review over

"application" questions and those involving "regulations").[1]

Prior to the passage of the REAL ID Act, the Circuit Courts regularly held that the traditional scope of habeas review encompasses questions concerning the application of law to fact. *See Singh v. Ashcroft*, 351 F.3d 435, 442 (9th Cir. 2003) (habeas jurisdiction was available over Singh's claim "even if that claim does not raise a 'purely legal question of statutory interpretation,'" because habeas jurisdiction has historically encompassed the "application" of law to fact); *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 222 (3d Cir. 2003) ("[h]abeas relief is traditionally available to correct 'errors of law, including the erroneous *application* or interpretation of statutes'") (citing *St. Cyr*, 533 U.S. at 302); *see also Wang v. Ashcroft*, 320 F.3d 130, 142-43 (2d Cir. 2003).

With the guidance of *St. Cyr*, the Courts of Appeals have continued to hold subsequent to the REAL ID Act that claims that were previously cognizable in habeas, including the application of law to fact, remain reviewable. *See, e.g., Jean-Pierre v. Attorney General*, 500 F.3d 1315 (11th Cir. 2007) (concluding that the court had jurisdiction to review an alien's CAT claim "in so far as he

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[1] *St. Cyr* also left no doubt that habeas review also encompassed legal questions concerning *regulations*. Indeed, one of the habeas cases on which the Supreme Court relied upon most heavily – *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) – involved a claim under a regulation, not a statute. *See St. Cyr*, 533 U.S. at 307 (citing *Accardi*).

challenges the application of an undisputed fact pattern to a legal standard"); *Jean v. Gonzales*, 435 F.3d 475, 482 (4th Cir. 2006) (concluding that a "determination involving the application of law to factual findings . . . presents a reviewable decision" under the REAL ID Act); *Chen*, 471 F.3d at 326-27 ("We construe . . . the REAL ID Act . . . to encompass the same types of issues that courts traditionally exercised in habeas review"); *Kamara v. Attorney General*, 420 F.3d 202, 211, 213-15 (3d Cir. 2005) (finding that the scope of review under REAL ID Act "mirrors" the scope of habeas review and exercising jurisdiction over BIA's application of regulatory standard to facts); *see also, Kolkevich v. Attorney General*, 501 F.3d 323, 335 (3rd Cir. 2007) (Holding that the REAL ID Act was intended to preserve judicial review for all aliens in proceedings, including those with criminal convictions.)

The Second Circuit agreed with the Third Circuit's holding in *Kolkevich, supra* that the REAL ID Act applied to those persons with criminal convictions. *Ruiz-Martinez v. Mukasey*, ____ F.3d ____ (2nd Cir. February 14, 2008) WL 383228 *Slip opinion* at 13. Indeed, the Second Circuit noted from the House Report on the REAL ID Act that:

> [u]nder section 106, all aliens who are ordered removed by an immigration judge will be able to appeal to the BIA and then raise constitutional and legal challenges in the courts of appeals. No alien, **not even criminal aliens, will be deprived of judicial review of such claims**. Unlike AEDPA and

> IIRIRA, which attempted to eliminate judicial review of criminal aliens' removal orders, section 106 would give every alien one day in the court of appeals, satisfying constitutional concerns. The Supreme Court has held that in supplanting the writ of habeas corpus with an alternative scheme, Congress need only provide a scheme which is an "adequate and effective" substitute for habeas corpus. Indeed, in *St. Cyr* ..., the Supreme Court recognized that "Congress could, without raising any constitutional questions, provide an adequate substitute through the court of appeals." By placing all review in the courts of appeals, [the REAL ID Act] would provide an "adequate and effective" alternative to habeas corpus.
>
> H.R.Rep. No. 109-72, at 174-75, U.S.Code Cong. & Admin. News 2005, pp. 240, 299-300 (internal citations omitted)

(emphasis added). *Id.*

Critically, some courts of appeals have continued subsequent to the REAL ID Act to find reviewable an alien's claim that he satisfies the CAT "more likely than not" standard. *See, e.g., Toussaint v. Attorney General*, 455 F.3d 409, 412 n.3 (3d Cir. 2006) ("The question here involves not disputed facts but whether the facts, even when accepted as true, sufficiently demonstrate that it is more likely than not that she will be subject to persecution or torture upon removal to Haiti. Therefore, we have jurisdiction to review the BIA's

application of law to the facts of this case."). *See also, e.g., Jean-Pierre v. Attorney General*, 500 F.3d 1315 (11th Cir. 2007) (concluding that the court had jurisdiction to review alien's CAT claim "in so far as he challenges the application of an undisputed fact pattern to a legal standard"); *Chen v. Dep't of Justice*, 471 F.3d 315, 332 n.10 (2d Cir. 2006) (noting that a challenge to an IJ's determination under CAT that an alien was not more likely than not to be tortured was a claim of erroneous application of law). The Seventh Circuit reached the opposite conclusion. *See Hamid v. Gonzales*, 417 F.3d 642, 647 (7th Cir. 2005); *c.f. Eke v. Mukasey*, 512 F.3d 372, 377 (7th Cir. 2008) (Noting that after having established that an alien in expedited removal proceedings was convicted of an aggravated felony offense, it had jurisdiction to review the legal standards applied by the IJ and BIA *de novo*.)

In short, habeas review has traditionally encompassed claims involving the application of law to fact. A construction of the REAL ID Act that would preclude all review over these types of claims would thus trigger far-reaching constitutional concerns.

Nothing in the text of § 1252(a)(2)(D) compels the conclusion that the statute applies only to a subset of legal claims. The text of § 1252(a)(2)(D) provides for review of "questions of law." The term is unqualified. It does not state that only statutory questions are reviewable, thereby excluding claims involving regulations. Nor does it refer only to questions of "interpretation" or to "pure" questions

of law, thereby excluding questions involving, as here, the *application* of statutes or regulations. Because nothing in the text of § 1252(a)(2)(D) compels the conclusion that the statute applies only to a subset of legal claims, it is "fairly possible" (*St. Cyr*, 533 U.S. at 300) to construe the statute to avoid the grave constitutional questions that would be raised by a statute limiting review to a narrow set of claims involving pure statutory construction. *See also* H.R. Rep. No. 109-72, at 174-75 (2005) (Conf. Rep.) (stating that the "purpose of [new § 1252(a)(2)(D)] is to permit judicial review over those issues that were historically reviewable on habeas").

The Fourth Circuit's conclusion that it lacked jurisdiction over Mr. Rangolan's petition raises serious constitutional concerns, conflicts with the text of 8 U.S.C. 1252(a)(2)(D), and is in direct conflict with the holdings of the courts of appeals in numerous circuits that have concluded that claims involving application of law to fact such as those raised by Mr. Rangolan present reviewable "questions of law."

Further, even if the Government were correct that the "more likely than not" determination raises a factual issue, the BIA committed clear legal error by applying an incorrect standard of review – raising a question of law reviewable by the courts of appeals under 8 U.S.C. 1252(a)(2)(D). The BIA exceeded its scope of review by engaging in a *de novo* review of the facts presented to the Immigration Court, without stating specifically whether the Immigration Court's findings were clearly erroneous. *See*, 8 C.F.R. § 1003.1(e)(3)(i).

Given the voluminous evidence in the Record of Proceedings that (1) Petitioner is a homosexual male with HIV+ status and (2) the culture and law in Jamaica is clearly hostile towards homosexuality (to the point that reggae stars call for the deaths of homosexuals in their lyrics with impunity and the death of one gay leader by a reggae star was treated with indifference by the government of Jamaica), it is clear that the BIA engaged in *de novo* review of the facts of this case and came to a different conclusion. *C.f.* 8 C.F.R. 1003.1(e)(3)(ii) (Permitting *de novo* review of "questions of law, discretion, and judgment and all other issues in appeals from decision of immigration judges.") This is a reviewable error of law, and the Fourth Circuit erred in dismissing Mr. Rangolan's petition for lack of jurisdiction.

Indeed, the Government, at all levels in this case, failed to address the language contained in the letter from the Embassy of Jamaica in Washington DC which enhances Petitioner's claim that the government knows of his status as a homosexual with HIV+ status and that the criminal law would be imposed against him should he fail to conceal what he is in public. To ignore the evidence in the record and then claim that the evidence is insufficient is tantamount to a denial of due process. The advocacy of such a circular argument does nothing to advance the rule of law and, rather, only serves to undermine it.

Furthermore, the Seventh Circuit recently held that forcing a person requesting withholding of removal to Nigeria based on his status as a person

convicted of drug-related offenses to demonstrate that a Nigerian law would be enforced against him was ludicrous – "Short of presenting himself to Nigerian authorities and waiting to see their reaction, we do not fathom how, at this juncture, Bosede could do more than take at face value the State Department's evidence that Decree 33 has not fallen into desuetude." *Bosede v. Mukasey*, 512 F.3d 946, 952 (7th Cir. 2008). The Seventh Circuit went further and found that the failure of the Immigration Judge in that case to consider all of the evidence presented by Bosede in support of his claim for relief from removal to rise to the level of a denial of due process.

Thus, for the BIA to claim that there is insufficient evidence that the government of Jamaica would target the petitioner in this case and enforce the criminal law against homosexual behavior is a denial of due process that should be addressed at the Circuit Court level and the Fourth Circuit's holding that it lacks jurisdiction to do so is erroneous.

CONCLUSION

The Court should grant the petition for a writ of *certiorari* and reverse the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 23, 2007

No. 07-1838
A41-830-049

PAUL ANTHONY RANGOLAN

Petitioner

v.

PETER D. KEISLER,
Acting United States Attorney General

Respondent

ORDER

Petitioner has filed a motion for stay of deportation, and respondent has filed a response to the motion. Respondent has filed a motion to dismiss, and petitioner has filed a response to the motion.

The motion for stay of deportation is denied, and the motion to dismiss is granted.

Entered at the direction of Judge Traxler with the concurrence of Judge Niemeyer. Judge Gregory

voted to grant the motion for stay and to deny the motion to dismiss.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX B

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board
of Immigration Appeals

Falls Church, Virginia 22041

File: A41 830 049 – Arlington, VA Date: AUG 16 2007

In re: PAUL ANTHONY RANGOLAN

IN ASYLUM PROCEEDINGS

APPEAL

ON BEHALF
OF APPLICANT: Linda A. Dominguez, Esquire

ON BEHALF OF DHS: Adam L. Goldman
Assistant Chief Counsel

APPLICATION: Convention Against Torture

The Department of Homeland Security (DHS) appeals the Immigration Judge's decision dated March 6, 2007, which granted the applicant's application for deferral of removal under the Convention Against Torture (CAT), 8 C.F.R. § 1208.17 (2007). The request for oral argument is denied. *See* 8 C.F.R. § 1003.1(e)(7). The appeal will be sustained and the Immigration Judge's decision vacated in part.

The applicant, a native and citizen of Jamaica, argues that he is eligible for deferral of removal under the CAT, asserting that he is a homosexual male who is HIV-positive; that he will be identified as such; that he will be arrested and imprisoned for committing homosexual acts; and that while in prison

he will be tortured. For an act to constitute "torture" for purposes of the CAT, it must be: (1) an act causing severe physical or mental pain or suffering; (2) intentionally inflicted; (3) for a proscribed purpose; (4) by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) not arising from lawful sanctions. *See Matter of J-E-*, 23 I&N Dec. 291, 297 (BIA 2002); 8 C.F.R. § 1208.18(a).

The Immigration Judge found that the applicant met his burden of proving a likelihood of torture if removed to his home country (I.J. at 8-9). Specifically, the Immigration Judge determined that the applicant was a homosexual; and that, if returned to Jamaica, it was more likely than not that he would commit homosexual acts; that he would be subject to imprisonment for such acts; and that he would be tortured (I.J. at 6, 9). We agree with the DHS that the Immigration Judge's conclusion is based on a series of unsupported suppositions, and that the record does not establish that it is more likely than not that any torture the applicant may suffer in Jamaica would be by or at the acquiescence of the government. *See Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006).

We acknowledge that the United States Department of State Country Report on Human Rights Practices (Report) for Jamaica for 2005 indicates that the Offenses Against the Person Act prohibits acts of physical intimacy between men, which are punishable by imprisonment (Exh. 3, Tab F at 5). However, there is little evidence of record as to the extent to

which this law is enforced. In fact, evidence submitted by the applicant indicates that it is impossible to determine how frequently the law is enforced (Exh. 3, Tab G at 21-25). Therefore, we cannot conclude that it is more likely than not that the applicant would in fact be arrested and prosecuted under this law. *See Matter of M-B-A-*, 23 I&N Dec. 474, 478-80 (BIA 2002).

Similarly, the record does not establish that it is more likely than not that, if arrested and imprisoned, the applicant would be tortured by or at the acquiescence of the Jamaican government. The 2005 Report states that male inmates who are deemed to be, or who admit to being, homosexual are held in a separate facility (Exh. 3, Tab F at 5). There were numerous reports of violence by both wardens and other inmates, though few inmates sought recourse through the system (Exh. 3, Tab F at 5). The Report states, however, that the law prohibits torture and that the government had made efforts to remove abusive guards and improve prison procedures (Exh. 3, Tab F at 2). In addition, the government generally cooperated with human rights and other groups who monitored the prisons (Exh. 3, Tab F at 2). *See generally Matter of T-M-B-*, 21 I&N Dec. 775, 779 (BIA 1997) (the Department of State's country profile is generally entitled to considerable deference); *Gonahasa v. INS*, 181 F.3d 538, 544 (4th Cir. 1999) (a State Department report on country conditions is highly probative evidence in an asylum case). We also note that the Report for 2006 shows that, although violence against

known or suspected homosexuals continued, the Jamaican government investigated and prosecuted reported incidents, and, with respect to two prior high-profile murder cases, made arrests and secured a conviction with a life sentence. In addition, the government instituted a process to investigate allegations of physical abuse of inmates by prison guards. The government was also working to reduce the stigma of HIV/AIDS. *See* 8 C.F.R. § 1003.1(d)(3)(iv) (the Board may take administrative notice of commonly known facts or the contents of official documents). Therefore, although problems persist, we cannot conclude on this record that the Jamaican government has instigated or been willfully blind to the violence aimed at homosexuals. *See Matter of J-E-, supra*; *Lopez-Soto v. Ashcroft,* 383 F.3d 228, 240 (4th Cir. 2005) (government "acquiescence" includes willful blindness). Accordingly, the following orders will be entered.

ORDER: The Department of Homeland Security's Appeal is sustained, and that part of the Immigration Judge's decision dated March 6, 2007, which granted deferral of removal under the Convention Against Torture is vacated.

FURTHER ORDER: The applicant is ordered removed to Jamaica.

/s/ Patricia A. Cole
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Arlington, Virginia

File No.: A 41 830 049 March 6, 2007

In the Matter of	)	
RANGOLAN, PAUL ANTHONY,	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	

CHARGE: The respondent had been ordered removed pursuant to Section 238(b) of the Act or the INS has initiated a prior exclusion/deportation or removal order of the above named alien pursuant to 241(a)(5) of the Act.

APPLICATIONS: Withholding of removal under the provisions of Section 241(b)(3) of the Act; withholding of removal under the provisions of Article 3 of the United Nations Convention against Torture; and deferral of removal under the provisions of Article 3 of the United Nations Convention against Torture.

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Linda A. Dominguez	Adam Goldman Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is an adult native and citizen of Jamaica. The respondent in fact has been previously deported from the United States and illegally entered the United States. That issue is not contested by either party. The respondent, both parties conceded, would not be eligible, statutorily, for asylum based upon his conviction of being an aggravated felon. The respondent is seeking withholding of removal to Jamaica, and in order to be eligible for this relief under the provisions of Section 241(b)(3), respondent must prove that his life or freedom would be threatened in Jamaica on account of his race, religion, nationality, membership in a particular social group, or political opinion. In order to make this showing, the respondent must establish a clear probability of persecution on account of one of the enumerated grounds. This clear probability standard requires a showing that it is more likely than not that the respondent would be subject to persecution if returned to the country from which he seeks withholding. The law provides, that if the respondent has been convicted of a particularly serious crime, that the respondent would not be statutorily eligible for withholding of removal under the provisions of Section 241(b)(3).

With respect to relief under the provisions of Article 3 of the United Nations Convention against Torture, the respondent must prove that it will be more likely than not that he would be subject to torture in Jamaica by the instigation of or with the acquiescence of public officials or those acting in an official capacity. Unlike asylum, which requires a showing of nexus, the respondent need not establish that the torture was on account of any particular ground.

As I stated, the applicant for withholding of removal under the Torture Convention bears the burden of proving that it would be more likely than not that he or she would be tortured if removed to Jamaica. If an Immigration Judge determines that the respondent is more likely than not to be tortured in Jamaica, the applicant for withholding of removal under the Torture Convention shall be granted unless the respondent is subject to a ground of mandatory denial. The grounds of mandatory denials are as follows: for applications filed after April 1, 1997 withholding of removal must be denied if an alien is deportable under 237(a)(4)(D) of the Act; 2) if the alien ordered, incited, assisted or otherwise participated in persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion; 3) if the alien having been convicted by final judgement of a particularly serious crime is a danger to the community of the United States; 4) there are serious reasons to believe that the alien committed a serious nonpolitical crime

outside the United States before the alien arrived in the United States; and 5) that there are reasonable grounds to believe that the respondent is a danger to the security of the United States.

If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by the preponderance of the evidence that such ground does not apply.

Now in evaluating this case with respect to the Torture Convention, I have applied the definition of torture contained in 8 C.F.R. Section 208.18(a)(1)-(8). If an alien is not eligible for withholding of removal under provisions of Article 3 of the United Nations Convention against Torture, the alien shall be granted deferral of removal to Jamaica where he or she is more likely than not to be tortured if the alien has been ordered removed and the alien is entitled to protection under the Convention against Torture and the alien is subject to the mandatory denial of withholding of removal pursuant to 8 C.F.R. Sections 208.16(b)(2) or (b)(3).

Deferral of removal does not confer upon the respondent any lawful or permanent Immigration status in the United States. If the respondent is subject to the custody of the Department of Homeland Security, deferral of removal would not result in his or her being released from custody. Deferral of removal may be terminated by the Court if the Court later determines that it is not likely that the respondent would

be tortured in Jamaica. The Department of Homeland Security Director, with jurisdiction over the alien whose removal has been deferred, must file a motion fulfilling certain requirements with the Immigration Court to schedule a hearing to consider whether deferral of removal should be terminated.

Termination of deferral of removal can also occur if the Attorney General, through the Secretary of State, has received diplomatic assurances from Jamaica that the respondent would not be tortured if the respondent were removed to that country. The Attorney General must decide whether the assurances are sufficiently reliable to allow the alien's removal to that country, consistent with Article 3 of the Convention against Torture. Deferral of removal is applicable only to the country to which it has been determined the alien is likely to be tortured and, thus, an alien may be removed to any other country where he or she is not likely to be tortured.

The respondent and the respondent's two sisters have testified under oath with respect to the respondent's applications for relief. The respondent also submitted numerous documents which this Court has considered, which include the State Department *Country Report* concerning the treatment of homosexuals in Jamaica. The Court has also received and taken into consideration the criminal history of the respondent, which is contained in the sentencing report conviction records.

With respect to the testimony of the respondent's two witnesses, the sisters, I find that their testimony is credible. With respect to the testimony of the respondent, I have taken into consideration the offenses for which he has been convicted including the fraud offenses, and it is my opinion that the respondent's testimony with respect to one of the main issues in the case, the fact that he claims he is a homosexual, is credible. His testimony with respect to that issue in my opinion has been detailed and consistent and corroborated by the credible testimony of the respondent's sisters. I have not taken into consideration any mannerisms of the respondent in arriving to conclusion that he is a homosexual.

With respect to the Government's concerns on that issue, that the respondent did marry a female and had a child from another female, it is the opinion of the Court that although that has taken place, that a person can still be a practicing homosexual and be involved in a heterosexual relationship. The Court could almost take administrative notice of that fact, based upon some of the individuals mentioned here, an Episcopalian bishop, and so it is not in the opinion of the Court applying the Court's common sense and knowledge of the ways of the world that a person can be married and still be a homosexual. I do find that the respondent is a homosexual.

With respect to his testimony concerning the offenses that he has committed, it is the opinion of the Court that the respondent in his testimony, although I have found him to be basically credible,

that he attempted to minimize his involvement in these very serious offenses for which he stands convicted.

Therefore, it is the opinion of the Court with respect to the main issue in this case, whether or not the respondent is a homosexual, that he has met his burden to prove that he is a homosexual. With respect to a nexus between the respondent being a homosexual and his application for relief under the provisions of Section 241(b)(3) withholding of removal, it is the opinion of the Court that the respondent is a member of a particular social group, and the case cited by the Government attorney would be the applicable case, *Matter of Toboso-Alfonso,* Int. Dec. 3222. That case has held that an applicant who had the status of being a homosexual both established his membership in a particular social group and demonstrated that his freedom was threatened within the meaning of the Act. So it is the opinion of the Court that the respondent is a member of a particular social group.

Now with respect to the relief of withholding of removal, as I stated, there is a nexus, however, the law does provide that if the respondent is convicted of a particularly serious crime that the respondent is not statutorily eligible for withholding of removal under the Act. The law provides that if a respondent receives a sentence of five years or more that that would conclusively make that crime a particularly serious crime and a danger to society. However, that is just one element. A person can still be guilty of committing particularly serious crimes if the sentence

is less than the five years. It is the opinion of the Court that one of the crimes in which the respondent was convicted, using, carrying and possessing a firearms during a drug trafficking offense in violation of 18 U.S.C. Section 924(c)(1)(A)(i), is considered by this Court to be a particularly serious crime. He received 27 months for that particular offense.

I also have taken into consideration in evaluating whether respondent is a danger to the community the fact that he also had in his possession or at least in his home a pistol, a shotgun, assault rifles, three handguns and also the large amount of marijuana that he was convicted of possessing, and the fact, it is an aggravating factor, he testified that he did not use marijuana, the fact that he at least passed that marijuana onto others would make him a danger to society. I have also taken into consideration that he has changed vehicle registrations on numerous occasions and used aliases on numerous occasions. Therefore, it is the opinion of the Court that the respondent has committed a particularly serious crime.

With respect to withholding of removal under the provisions of Article 3 of the United Nations Convention against Torture, although that particular offense does not require a nexus to any of the five grounds, it is the opinion of the Court that the respondent has been convicted of a final judgement of a particularly serious crime and is a danger to the community, and, therefore, respondent would not be eligible for the

relief of withholding of removal under the Convention against Torture.

With respect to deferral of removal, it is the opinion of the Court that the respondent has met his burden to prove that it would be more likely than not that he would suffer torture if removed to Jamaica. I have taken into consideration the background documents submitted by the respondent in the nature of articles, but most importantly the *Country Reports for Human Rights Practices* published by the State Department on March 8, 2006. That report states that the offenses against the person's act prohibit acts of gross indecency, generally interpreted to be any kind of physical intimacy between men in public or in private, which are punishable by ten years in prison. Although Prime Minister Patterson stated that the country would not be pressured to change its antihomosexual laws, in October a parliamentary committee met and proposed a debate on that issue. The report also goes on to list individuals who were homosexuals who were killed, and also that in December a homophobic mob allegedly chased a homosexual off a pier where he drowned.

I have also taken into consideration the fact that I did find credible that the respondent was chased and beaten by an antihomosexual mob and that he would have no recourse to the government of Jamaica. I have also taken into consideration, with respect to the State Department *Report* section on torture, that although the law prohibits such practices, reports of physical abuse of prisoners by guards

continued despite efforts of the government to remove abusive guards and improve procedures. This lists instances where individuals who are apprehended and detained are tortured. It is the opinion of the Court that if the respondent were returned to Jamaica that it would be more likely than not based upon his history as being a homosexual that he would commit homosexual acts and would be subject to imprisonment for that act and tortured.

ORDER

Accordingly, the application for withholding of removal under the provisions of Section 241(b)(3) is denied.

The application for withholding of removal under the provisions of Article 3 of the United Nations Convention against Torture is denied.

The application for deferral of removal under the provisions of Article 3, the United Nations Convention against Torture is granted.

WAYNE R. ISKRA
Immigration Judge

APPENDIX D

FILED: November 21, 2007

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1838
(A41-830-049)

PAUL ANTHONY RANGOLAN,

Petitioner

v.

MICHAEL B. MUKASEY, Attorney General,

Respondent

ORDER

The Court denies the motion for stay and the petition for rehearing and rehearing en banc. No poll was requested on the petition.

Entered at the direction of Judge Niemeyer with the concurrence of Judge Traxler. Judge Gregory voted to grant the motion for stay and petition.

For the Court

/s/ Patricia S. Connor, Clerk

[SEAL]

APPENDIX E

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals,
Office of the Clerk
P.O. Box 8530
5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Leon Fresco, Esquire
701 Brickell Ave., Ste. 300
Miami, FL 33131

Office of the District Counsel/PIS
P.O. Box 1711
Harlingen, TX 78551

Name: [redacted]

A# [redacted]

Date of this notice:
12-18-2007

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna M. Carr
Chief Clerk

Enclosure

Panel Members:
Lauri S. Filppu
Roger Pauley
Patricia A. Cole

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board
of Immigration Appeals

Falls Church, Virginia 22041

File: [redacted] – Los Fresnos, TX Date: DEC 18 2007

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF
OF RESPONDENT: Leon Fresco, Esquire

ON BEHALF OF DHS: Dona J.F. Justus
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] – In the United States in violation of law

APPLICATION: Asylum; withholding of removal; Convention Against Torture; voluntary departure

In a decision dated May 4, 2007, an Immigration Judge found the respondent removable as charged and denied his applications for asylum, withholding of removal, protection under the Convention Against Torture, and for voluntary departure. The respondent's appeal of that decision will be sustained in part and dismissed in part.

On appeal, the respondent argues that the Immigration Judge erred in not granting him an exception

to the 1-year asylum application filing requirement because he established that he suffers from Post Traumatic Stress Disorder (PTSD) due to his violent harassment and the shooting he experienced in Jamaica on account of his homosexuality. *See* 8 C.F.R. § 1208.4 (2007). The Immigration Judge did not find the respondent's assertions about his medical condition to be incredible and also took into consideration the testimony of respondent's doctor (I.J. at 9-10, 30); however, he found that the respondent had failed to file a timely asylum application because he did not know about such relief and because he failed to obtain legal counsel at the time of his arrival (I.J. at 30).

The respondent contests this determination on appeal, asserting that the Immigration Judge's decision failed to take into consideration the doctor's testimony and also erroneously relied on a case from the United States Court of Appeals for the Eighth Circuit (Respondent's Br. at 14-15 (citing *Molathwa v. Ashcroft*, 390 F.3d 551 (8th Cir. 2004))). Furthermore, because the Immigration Judge found the respondent and all of his witnesses credible, according to the respondent, he also should have credited their testimony that the respondent's failure to file an asylum application within 1 year of arrival was due to mental illness (Respondent's Br. at 15).

We agree with the respondent that to the extent the Immigration Judge appears to have relied on *Molathwa v. Ashcroft, supra,* that case does not support his decision (*see* I.J. at 30-31). The alien in

Molathwa, supra, did not suffer from PTSD and the Eighth Circuit determined only that it did not have jurisdiction to review the determination that the application was not timely filed. *Id.* at 553. *See* section 208(a)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a)(3). The case offers no grounds upon which to find the respondent statutorily ineligible for asylum.

However, we are not prepared to find clear error in the Immigration Judge's factual determinations leading to his decision finding the respondent statutorily ineligible for asylum. As noted by the Immigration Judge, the record contains different explanations for why the respondent did not timely file an application (I.J. at 28-31). The Immigration Judge notes that the respondent's original asylum application indicated that he did not know about asylum (I.J. at 28-29); his amendment, which the Immigration Judge admits supersedes the original, references the trouble he experienced due to his experiences in Jamaica and that the result has been a diagnosis of PTSD (I.J. at 29-30). The Immigration Judge then notes that the respondent testified both that he did not know he could file for asylum when he first arrived here and also feared returning to Jamaica (I.J. at 30).

Based on the respondent's statements, we cannot find clear error in the Immigration Judge's finding that the respondent failed to establish that PTSD caused his late filing, as opposed to failing to file simply because he was not aware of the relief. The respondent simply has not shown that he likely would

have learned about asylum and applied within 1 year had he not suffered from PTSD. As correctly noted by the respondent, the Immigration Judge found the respondent and his witnesses credible (Respondent's Br. at 23; I.J. at 28). Like the Immigration Judge, we do not find that this testimony or other evidence from the respondent's expert witness provides a direct link between his PTSD and his actions or inactions that would account for the late-filing of the asylum application.

We do not doubt that suffering from PTSD can affect one's life in many ways. However, it is the respondent's burden to establish that extraordinary circumstances led to his inability to file a timely application. *See* 8 C.F.R. § 1208.4(a)(5)(i), (ii); *see also Mukamusoni v. Ashcroft*, 390 F.3d 110, 117 (1st Cir. 2004) (noting that the Immigration Judge had excused the alien's late filing of the asylum application because she was diagnosed with PTSD which left her debilitated with fear and anxiety). We are not convinced that the respondent was debilitated in such a way that his medical condition prevented him from completing and submitting an asylum application.

Although the respondent is statutorily ineligible for asylum, he remains eligible for withholding of removal. The Immigration Judge assumed that the respondent's homosexuality qualified as membership in a particular social group and that he had been harmed on account of his sexual orientation (I.J. at 31), but he denied the respondent's claim for withholding of removal because the respondent had never

been harmed, threatened, or harassed by the government of Jamaica (I.J. at 31-34). The Immigration Judge also pointed out that the respondent had not reported the incidents of harm to the police except for the time he was shot and there was no evidence that this incident was not fully investigated by the police (I.J. at 31-32).

We cannot agree with the Immigration Judge's conclusion that the respondent has failed to show past persecution. In particular, we note that while the Immigration Judge's decision clearly summarizes the evidence presented by the respondent (I.J. at 9-28), his analysis does not appear to weigh in all of the important aspects of the evidence when deciding that the respondent failed to meet his burden of proof (*see* I.J. at 31-38). The Immigration Judge concludes that the there are instances in Jamaica where police and other public officials commit acts of violence against homosexuals or do not investigate violence by private citizens, but that these are "rogue police officers" and the "respondent has not shown that it is more likely than not that respondent would suffer persecution by any Government agent in Jamaica" (I.J. at 37-38). We do not agree.

The respondent was shot because of his homosexuality. Further, the record documents violence towards homosexuals by public officials and private citizens who are not brought to justice. The police are not generally inclined to help homosexuals because a homosexual is considered a *persona non grata*. The evidence of societal and governmental bias would not

enable DHS to rebut the presumption arising from past persecution, such that a grant of withholding of removal is mandated. Accordingly, we decline to address the respondent's claim for protection under the Convention Against Torture and also find no grounds upon which to remand in order to allow, as requested, the respondent to submit additional evidence.

ORDER: The respondent's appeal is sustained in part and dismissed in part.

FURTHER ORDER: The Immigration Judge's decision finding the respondent statutorily ineligible for asylum is affirmed.

FURTHER ORDER: The Immigration Judge's decision finding the respondent ineligible for withholding of removal is vacated.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h). *See* Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 Fed. Reg. 4743, 4752-54 (Jan. 31, 2005).

/s/ Lari Filppu
FOR THE BOARD

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board
of Immigration Appeals

Falls Church, Virginia 22041

File: [redacted] – Los Fresnos, TX Date: DEC 18 2007

In re: [redacted]

CONCURRING/DISSENTING OPINION:
Patricia A. Cole, Board Member

I agree with the majority that the respondent is eligible for withholding of removal. I write separately, however, because I would also find the respondent eligible to apply for asylum in that he has established that his medical condition entitles him to an exception to the 1-year filing bar.

Although there were different explanations provided for why the respondent did not timely file an application (I.J. at 28-31), it is not clear that the respondent's medical condition did not contribute to his inability to gain information about United States asylum laws. As correctly noted by the respondent, the Immigration Judge found the respondent and his witnesses credible (Respondent's Br. at 23; I.J. at 28). While the respondent does not provide a clear picture of mental disability preventing his timely filing which would give rise to an exception to the 1-year filing bar, the respondent's doctor provides more concrete explanations of the respondent's mental state and provides evidence of a condition that would clearly impact a person's ability to seek out legal aid and even human contact.

For example, Dr. Linskey, a clinical psychologist who examined the respondent, testified that the respondent suffered from feelings of intense psychological distress and fear due to his experiences in Jamaica, and that this would lead him to avoid any situations which might promote the type of hostility he had previously encountered on account of his homosexuality (Tr. at 28-31). In light of this evidence, I would find clear error in the Immigration Judge's conclusions regarding the reason why the respondent failed to file a timely application for relief and, therefore, I would find that he has established grounds for an exception to the 1-year filing requirement. 8 C.F.R. § 1208.4(a)(5)(i), (ii) (2007); *see Mukamusoni v. Ashcroft*, 390 F.3d 110, 117 (1st Cir. 2004) (noting that the Immigration Judge had excused the alien's late filing of the asylum application because she was diagnosed with PTSD which left her debilitated with fear and anxiety). I would then remand proceedings in order for the Immigration Judge to reassess the respondent's eligibility for asylum.

/s/ Patricia A. Cole
Patricia A. Cole
Board Member

APPENDIX F

EMBASSY OF JAMAICA
1520 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20036
TELEPHONE: (202) 452-0660
FACSIMILE: (202 452 0081

January 18, 2006

Mr. Paul Rangolan
1435 North Courthouse Rd.
Arlington, VA 22201

Dear Mr. Rangolan:

This serves to acknowledge receipt of your letter dated December 17, 2005 addressed to the Ambassador in which you expressed your concerns about returning to Jamaica. I have noted these concerns; however, neither the Ambassador nor myself can intervene to prevent the United States government from deporting you.

I have gleaned from your letter that you are afflicted with HIV Aids and your sexual preference is not compatible with the opposite sex. Consequently, you have alleged that persons armed with machetes in Jamaica chased you. Please bear in mind that your sexual orientation is still a breach under Jamaican laws; nonetheless, an attack on your person should have been reported to the police. You will have to conceal your sexual body language to prevent future assault as you move around.

Unfortunately, I cannot accede to your request to withhold a travel document from US Immigration. Your HIV status is not grounds for refusing to issue a travel document either. I wish to advise that systems are in place in Jamaica to assist persons with HIV Aids; for example, treatment is available, the medication can be accessed at a reduced rate and counseling is also available. These resources will enable you to live a normal life.

I am suggesting that you contact your relatives here in the United States and mobilize their support to enhance your welfare on your return to Jamaica. If you have the evidence to challenge your removal on humanitarian grounds, I implore you to go for it. Good luck in your endeavour to remain in the United States.

Yours sincerely,

/s/ Ahan Brown
Ahan G. Brown
Security Attaché

APPENDIX G

REASONABLE FEAR DETERMINATION

ALIEN NUMBER: A41 830 049	**INTERVIEW DATE: 14 Dec 2006**
NAME: RANGOLAN, Paul Anthony	**ASYLUM OFFICER: ZAR 145**
COUNTRY: Jamaica	**REVIEWING SAO: ZAR 139**
ASYLUM OFFICE: ZAR	**LOCATION: DHS,ICE,WAS,DRO**

Background

The applicant indicated that he is a 42 year-old native and citizen of Jamaica, who last entered the United States with a legal permanent residence card on 20 March 1999. The following has been ascertained from information in the applicant's file[1] and from the applicant's testimony. On 19 September 2006, the United States District Court for the District of Columbia convicted the applicant of (1) Using, Carrying & Possessing A Pistol During A Drug Trafficking Offense, and (2) Illegal Reentry Of An Alien Following Conviction For An Aggravated Felony, in violation of 18 USC 924(c)(1)(A) and 8 USC 1326(a), respectively. The total sentence was "Time Served"

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[1] Please note that it appears that A27 959 830 (located at NRC, and requested expeditiously on 26 December 2006) must be consolidated with the applicant's primary file, A41 830 049 (already consolidated with A28 371 000).

given that the applicant cooperated with agencies in an ongoing investigation.[2] Thus, the applicant has a final conviction of an aggravated felony as defined in sections 101(a)(43)(B) and (O) of the INA, 8 USC 1101(a)(43)(B). The Immigration Judge ordered the applicant deported on 21 December 1998. And, the applicant was removed from the United States on 13 January 1999. However, the applicant illegally reentered the United States on or about 1 March 1999. Previously, the applicant was detained at the Piedmont Regional Jail in Virginia. Subsequently, the applicant has been relocated to the Hampton Roads Regional Jail in Virginia. On 28 September 2006, ICE served Notice of Intent/Decision to Reinstate Prior Order on the applicant pursuant to 241(a)(5) of the

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[2] According to Form I-831, Record of Deportable/Inadmissible Alien, on 27 February 2005, the applicant pleaded guilty to a violation of 18 USC 922. And, on 19 January 2006, the court sentenced, in relevant part, the applicant to imprisonment for twenty-seven (27) months. Additionally, Form I-831 indicated that the applicant completed his 27-month incarceration. Please note that pages three (3) and six (6) of the court disposition were missing from the A file. Also, please note that on 16 March 1990, the United States District Court for the District of Columbia convicted the applicant of Embezzlement [B]y [A] Bank Employee, in violation of 18 USC 656. The court sentenced, in relevant part, the applicant to "probation for a term of five (5) years with credit for time served". Further, please note that on 24 February 1997, the United States District Court for the District of Maryland convicted the applicant of Conspiracy [T]o File False Tax Returns, in violation of 18 USC 286. The court sentenced, in relevant part, the applicant to imprisonment for twelve (12) months and one (1) day as well as to pay restitution to the United States Internal Revenue Service.

INA. Because the applicant expressed a fear of return to Jamaica, he was referred to the Arlington Asylum Office in Arlington, Virginia, for a reasonable fear determination on 8 November 2006. A reasonable fear orientation was completed with the applicant on 9 November 2006, at which time the applicant indicated that his representative was Linda DOMINGUEZ. ZAR interviewed the applicant at the DHS/ICE Washington District Office on 14 December 2006, in connection with his reasonable fear claim.

The applicant expressed a fear that private individuals in Jamaica will harm, kill or torture him on account of his membership in a particular social group (effeminate Jamaican men who have an actual or perceived homosexual orientation). The applicant believes that such harm or death will occur with the approval or insistence of authorities for the government of Jamaica.

Testimony

The applicant testified that he is a citizen and a national of Jamaica with permanent residence in the United States as the spouse of an United States citizen.[3] The applicant indicated that he initially entered the United States without inspection between

[3] The applicant is unaware whether he remains married legally to the United States citizen spouse.

1982 and 1984.[4] The applicant remained in the United States until 13 January 1999, when United States immigration officials removed the applicant to Jamaica pursuant to an Immigration Judge's Order of Removal issued on 21 December 1998. The applicant remained in Jamaica until on or about 1 March 1999, when the applicant returned to the United States.[5]

While in Jamaica from about January 1999 until about March 1999, the applicant indicated that he resided with a brother in Kingston. Neighbours inquired of the applicant's brother whether the applicant is an homosexual given the applicant's effeminate appearance, speech and walk. The applicant's brother always replied in the negative. However, the neighbours continued to question the applicant's brother about the applicant's sexual identity. Consequently, the applicant left his brother's residence and moved to Half Tree House in central Kingston, an area commonly known to be frequented by homosexuals.

Between January and February 1999, about thirty (30) individuals surrounded the applicant and his

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[4] Review of the applicant's A file revealed that the applicant previously indicated that he entered the United States with inspection on or about 1 January 1983 via Miami, Florida, with permission to remain in the United States as a visitor for about three (3) weeks.

[5] The applicant indicated that he presented his legal permanent residence card to United States immigration officials at Miami, Florida, to make an entry into the United States.

friend, shouting derogatory references to homosexual individuals and cutting the applicant on his left arm as well as injuring the applicant's friend's head. The applicant and his friend escaped from the group of assailants and received medical assistance. Then, the applicant made arrangements to return to the United States via the Bahamas. Subsequently, the applicant's sister informed the applicant that neighbours who questioned the applicant's sexual orientation accosted and shot the brother with whom the applicant lived from around January to March 1999 because of the applicant's sexual orientation. The applicant's brother died on 22 July 1999.

Analysis

To establish a reasonable fear of persecution, an applicant must establish that there is a reasonable possibility that he would be persecuted on account of his race, religion, nationality, membership in a particular social group, or political opinion in the country to which he has been ordered removed. To establish a reasonable fear of torture, an applicant must establish that there is a reasonable possibility that he would be subjected to torture in the country to which he has been ordered removed, as defined in the Convention against Torture and the United States regulations.

Credibility

Although there were initial concerns of the applicant's Jamaican citizenship and nationality because of the applicant's oral testimony at the reasonable fear interview[6], the applicant's level of education and fluency in the English language, subsequent evidentiary documentation obtained by ICE officials indicate that the applicant is a citizen of Jamaica. Specifically, a Birth Registration Form indicated that the applicant was born at the University College Hospital of the West Indies, located in Mona, St. Andrew Parish, Jamaica, on 19 March 1964. Additionally, a statement by the Assistant Commissioner

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[6] An initial search of the applicant's primary A file failed to indicate that the applicant had any identity documents such as a birth certificate, passport or national identity card. Thereby, the Asylum Pre-Screening Officer ("APSO") asked the applicant questions that would assist the applicant in establishing his Jamaican identity. Specifically, the APSO asked the applicant for: (a) the geographical location of the applicant's hometown, Kingston, (b) a description of the Jamaican flag, (c) the title of the Jamaican national anthem, (d) any words to the Jamaican national anthem, (e) the name of the current president of Jamaica and (f) Jamaica's date of independence. When provided an opportunity to respond to each of these questions, the applicant responded in the negative; he did not know the answer to any of these questions (please note that the applicant correctly indicated that the Jamaican flag does contain the colour "black"). When asked why the applicant was unable to provide a response to the aforementioned questions given that the questions were civic questions that any national and citizen of Jamaica should know, the applicant only responded that, "I just do not remember. I just choose not to remember anything about Jamaica, period."

of Police of the Jamaica Constabulary, issued to the American Consulate in Mexico, indicated that the applicant is a native of Jamaica, born on 19 March 1964. In light of this additional evidentiary documentation used by ICE officials to remove the applicant from the United States to Jamaica in 1999, the applicant's overall testimony concerning his Jamaican citizenship is deemed to be credible. Additionally, the applicant's testimony concerning events that happened to him in Jamaica in 1999, resulting in his reasonable fear of persecution on account of his membership in a particular social group (effeminate Jamaican men who have an actual or perceived homosexual orientation), is deemed to be credible.

Applicant's Past Mistreatment

The events described by the applicant amount to past persecution. The applicant testified that a group of 30 unknown individuals taunted him with derogatory terms and cut him on his left arm sometime between January and February 1999 because of the applicant's homosexual orientation. The applicant did not report the incident to the Jamaican authorities because the authorities have not been responsive to investigations of acts targeting homosexuals. Also, the applicant indicated that his brother's neighbours killed the brother in July 1999 because of the applicant's homosexual orientation. Thus, the harm suffered by the applicant and his family member rises to the level of persecution.

Applicant's Risk of Being Persecuted or Tortured

A preponderance of the evidence fails to establish that there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution if he were to return to Jamaica. Credible country conditions reports indicate that:

> The Jamaica Forum for Lesbians, All Sexuals, and Gays (J-FLAG) continued to report allegations of human rights abuses, including police harassment, arbitrary detention, mob attacks, stabbings, harassment of homosexual patients by hospital and prison staff, and targeted shootings of homosexuals. Police often did not investigate such incidents. J-FLAG documented a number of instances of homophobic violence during the year, some of which resulted in charges brought to court, while others were never reported to authorities by reason of fear . . . male inmates deemed by prison wardens to be homosexual are held in a separate facility for their protection. The method used for determining their sexual orientation is subjective and not regulated by the prison system . . . Homosexual men were hesitant to report incidents against them because of fear for their physical wellbeing. Human rights NGOs and government entities agreed that brutality against homosexuals, both by police and private citizens, was widespread in the community. *Country Reports on Human Rights*

Practices 2005, Jamaica, U.S. Department of State, http://www.state.gov/g/drl/rls/hrrpt/2005/61733.htm, [last accessed 26 December 2006].

. . . Others tell tales of police stopping cars full of men at night and harassing them with homophobic insults . . . there is no openly acknowledged gay social space in Jamaica. Not one bar, nightclub or café where same-sex couples can meet openly without the threat of violence . . . For the most part Jamaica seems to function socially on a 'Don't ask, don't tell' policy when it comes to sexual orientation . . . To navigate this minefield you have to act straight or at least not too gay . . . in Jamaica the stakes are higher. Let your mask slip in the wrong place or at the wrong time and you could find yourself at the mercy of the mob. *Troubled Island, Guardian,* 27 April 2006, http://www.guardian.co.uk/print/0,,329466084-103390,00.htm, [last accessed 26 December 2006].

'Police abuse prompting violence against men perceived to be homosexual: 'The two male officers started to beat the man with batons. I turned to the female officer and asked, 'What has he done wrong?' She turned to me and said, 'Everyday [w]e have to warn people about this guy coming on the beach. I'm going to lock him up.' I said, 'For what?' She didn't say. The two policemen said, 'Beat him because him a battyman [homosexual].'

– Fred L., 30, who witnessed police beating a man perceived to be gay and then urging others

> to beat him because he was homosexual on June 18 2004 in Montego Bay. The man fled the police and according to local accounts, was chopped, stabbed, and stoned to death by a crowd. *Testimonies from "Hated to Death: Homophobia, Violence, and Jamaica's HIV/AIDS Epidemic"*, Human Rights Watch, http://hrw.org/english/docs/2004/11/16/jamaic9674.htm, [last accessed 10 January 2007].

A preponderance of the evidence fails to establish that the applicant could avoid future persecution by relocating within his country and that, under all the circumstances, it would be reasonable for him to do so. As referenced in the aforementioned credible country conditions reports, the threat of persecution exists countrywide because the applicant's persecutors are private individuals who act with the approval or the insistence of governmental authorities in Jamaica.

Conclusion

For the reasons stated above, the applicant has established a reasonable fear of persecution.

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No. 07-1169

In the Supreme Court of the United States

PAUL ANTHONY RANGOLAN, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in denying petitioner's motion for a stay of removal.

2. Whether the court of appeals erred in holding that it lacked jurisdiction to review the Board of Immigration Appeals' denial of petitioner's request for deferral of removal under the Convention Against Torture.

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In the Supreme Court of the United States

No. 07-1169

PAUL ANTHONY RANGOLAN, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unreported. The opinions of the Board of Immigration Appeals (Pet. App. 3-6) and the immigration judge (Pet. App. 7-16) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 2007. A petition for rehearing was denied on November 21, 2007 (Pet. App. 17). On February 13, 2008, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 11, 2008, and the petition was filed on that date. Petitioner improperly invokes this Court's jurisdiction under 8 U.S.C. 1252(a)(1), but this Court's jurisdiction is properly invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1996, Congress amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to expedite the removal of criminal and other illegal aliens from the United States. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Four amendments to the INA are particularly relevant here.

First, Congress streamlined the removal of aliens who illegally reenter the United States after being deported or removed by authorizing the reinstatement of an earlier removal order without the need for additional administrative proceedings. See IIRIRA § 305(a)(3), 110 Stat. 3009-599 (codified at 8 U.S.C. 1231(a)(5)). As a result, when an alien who has previously been removed or who departed voluntarily under an order of removal illegally reenters the United States, the Department of Homeland Security (DHS) may simply execute the prior order again. See *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006).

Second, Congress eliminated the provision of the INA that automatically stayed the enforcement of a removal order upon the filing of a petition for review in a court of appeals, providing instead that the court may issue a discretionary stay of removal during the pendency of a judicial review proceeding on a case-by-case basis. See IIRIRA § 306(a)(2), 110 Stat. 3009-608 (codified at 8 U.S.C. 1252(b)(3)(B)). Congress also ensured that, if an alien is removed while his petition for review is pending, removal from the United States does not divest the court of jurisdiction it otherwise possesses. IIRIRA § 306(b), 110 Stat. 3009-612 (repealing 8 U.S.C. 1105a(c) (1994)); see, *e.g.*, *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 192 (4th Cir. 2004); see also *Stone* v. *INS*,

514 U.S. 386, 398-399 (1995) (discussing pre-IIRIRA INA provisions governing stays and barring judicial review once an alien has been deported).

Third, Congress provided a statutory standard for when the federal courts may enjoin execution of removal orders. The INA now provides that "no court shall enjoin the removal of any alien pursuant to a final order under [8 U.S.C. 1252] unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." 8 U.S.C. 1252(f)(2).

Finally, Congress restricted federal-court review of final orders of removal entered against criminal aliens. The INA now provides, in pertinent part:

> [N]o court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section [1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D)].

8 U.S.C. 1252(a)(2)(C).[1] In 2005, Congress qualified this jurisdictional bar by providing:

> Nothing in subparagraph (B) or (C), or in any other provision of this Chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. 1252(a)(2)(D), as added by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 310.

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[1] All references to 8 U.S.C. 1252(a)(2)(C) and (D) are to the 2005 Supplement.

2. Petitioner, a native and citizen of Jamaica, was admitted to the United States in 1987 as a lawful permanent resident. A.R. 2, 299-301, 470-471. He has a lengthy criminal history in the United States. He was arrested in 1987 for theft; in 1994 for unlawful entry, assault with a dangerous weapon, and theft; and in 1995 for receiving stolen property; and a warrant was issued for his arrest for retail theft in 2001. A.R. 231, 298-299. Petitioner also frequently used aliases and changed his vehicle registration to evade law enforcement authorities. Pet. App. 14; A.R. 232.

Petitioner also was convicted of two federal crimes. In March 1990, he was convicted of embezzlement by a bank employee, in violation of 18 U.S.C. 656, and was sentenced to five years of probation. A.R. 296-297. In February 1997, he was convicted of conspiracy to file false tax returns, in violation of 18 U.S.C. 286, and was sentenced to one year and one day of imprisonment and two years of supervised release. A.R. 293, 296-298.

Petitioner was placed in removal proceedings in 1998 and charged with being removable pursuant to 8 U.S.C. 1227(a)(2)(A)(ii) for committing two crimes of moral turpitude and pursuant to 8 U.S.C. 1227(a)(2)(A)(iii) for committing an aggravated felony. A.R. 293; Gov't C.A. Mot. to Dismiss 2-3. An immigration judge (IJ) found petitioner removable as charged, and petitioner was removed from the United States in January 1999 and was informed that he could not apply for readmission to the United States without the Attorney General's approval. A.R. 293-294.

Two months later, petitioner illegally reentered the United States. A.R. 196, 239, 294. Petitioner continued to engage in criminal activity. In 2003, he regularly purchased large quantities of marijuana, which he provided

to guests at his home. A.R. 229, 294. In June 2004, agents of Immigration and Customs Enforcement (ICE) in the Department of Homeland Security who were executing a search warrant at petitioner's residence discovered approximately one kilogram of marijuana, a .45 caliber semi-automatic pistol, a shotgun, assault rifles, three handguns, and approximately $4,280 in cash. Pet. App. 14; A.R. 294-295. Petitioner pleaded guilty to using, carrying, and possessing a firearm during a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A), and to illegal reentry following removal, in violation of 8 U.S.C. 1326(a) and (b)(2), and was sentenced to twenty-seven months of imprisonment. A.R. 235, 293-294.

ICE determined that petitioner was subject to removal through reinstatement of his prior removal order. See 8 U.S.C. 1231(a)(5). Petitioner sought relief from removal in the form of withholding of removal under 8 U.S.C. 1231 or withholding or deferral of removal under the United Nations Convention Against Torture and Other Cruel and Degrading Treatment or Punishment (CAT), Dec. 10, 1984, 1465 U.N.T.S. 85. A.R. 451-455. Petitioner contended that he would be persecuted and/or tortured on account of his sexual orientation and his HIV-positive status if removed to Jamaica. Pet. App. 3-4. Because petitioner asserted a fear of persecution and torture in Jamaica, his case was referred to an IJ. A.R. 451-452; see 8 C.F.R. 1238.1(f)(3).

3. Before the IJ, petitioner conceded that he was ineligible for asylum because he had been convicted of an aggravated felony. Pet. App. 8; see 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i). The IJ denied withholding of removal under 8 U.S.C. 1231 and the CAT, but granted deferral of removal under the CAT. Pet. App.

7-16. The IJ first found that petitioner is ineligible for withholding of removal under both 8 U.S.C. 1231 and the CAT because he had been convicted of a particularly serious crime (his drug trafficking offense) and his prior crimes and his large firearms collection make him a danger to the community. Pet. App. 13-14; see 8 U.S.C. 1231(b)(3)(B); 8 C.F.R. 1208.16(d)(2).

The IJ then determined that petitioner is eligible for deferral of removal under the CAT. Pet. App. 14-16; see 8 C.F.R. 1208.17. The IJ found that petitioner is a homosexual; that petitioner was previously "chased and beaten by an antihomosexual mob" in Jamaica; that Jamaican law criminalizes "any kind of physical intimacy between men in public or in private"; and that there is "physical abuse of prisoners by guards" in Jamaican prisons. Pet. App. 15-16. The IJ then concluded that, if petitioner was returned to Jamaica, "it would be more likely than not based upon his history * * * that he would commit homosexual acts and would be subject to imprisonment for th[ose] act[s] and tortured." *Id.* at 16.

4. The Board of Immigration Appeals (BIA) vacated the IJ's grant of deferral of removal under the CAT and ordered petitioner removed to Jamaica. Pet. App. 3-6. It found that the IJ's conclusion that petitioner would be tortured if removed to Jamaica "is based on a series of unsupported suppositions" and that "the record does not establish that it is more likely than not that any torture [petitioner] may suffer in Jamaica would be by or at the acquiescence of the government." *Id.* at 4. The BIA acknowledged that Jamaican law does "prohibit[] acts of physical intimacy between men," but it determined that because "there is little evidence" regarding "the extent to which this law is enforced," the IJ erred in concluding

that petitioner would likely be arrested and prosecuted for being a homosexual. *Id.* at 4-5.

Further, the BIA found that "the record does not establish that it is more likely than not that, if arrested and imprisoned, [petitioner] would be tortured *by or at the acquiescence of* the Jamaican government," Pet. App. 5 (emphasis added), a necessary showing for CAT protection. The BIA noted that Jamaican law prohibits torture; that the Jamaican government "ha[s] made efforts to remove abusive guards and improve prison procedures"; that the Jamaican government has "generally cooperated with human rights and other groups who monitored the prisons"; that the Jamaican government has investigated and prosecuted incidents of violence against homosexuals; and that the Jamaican government is "working to reduce the stigma of HIV/AIDS." *Id.* at 5-6. Accordingly, the BIA found that the IJ erred in finding government acquiescence because the Jamaican government has not "instigated or been willfully blind to the violence aimed at homosexuals." *Id.* at 6.

5. Petitioner filed a petition for review in the court of appeals and sought a stay of removal while his petition was pending. The government moved to dismiss the petition for review under 8 U.S.C. 1252(a)(2)(C) because petitioner is removable by reason of his aggravated felony conviction. See Gov't C.A. Mot. to Dismiss 5-7; see also 8 U.S.C. 1227(a)(2)(A)(iii). The government acknowledged that, notwithstanding the jurisdictional bar in 8 U.S.C. 1252(a)(2)(C) to review of removal orders entered against aggravated felons, the court of appeals had jurisdiction to consider "constitutional claims or questions of law" under 8 U.S.C. 1252(a)(2)(D). But the government explained that petitioner's fact-bound challenge to the BIA's denial of deferral of removal under

the CAT did not present any such questions. Gov't C.A. Mot. to Dismiss 8. The government also opposed the motion for a stay, arguing that petitioner did not qualify under either the standard set forth in 8 U.S.C. 1252(f)(2) or under the traditional standard for preliminary injunctive relief. *Id.* at 8-16.

The court of appeals granted the government's motion to dismiss and denied petitioner's motion for a stay in a brief, unpublished order. Pet. App. 1-2. Judge Gregory noted his dissent from the order. *Ibid.* A petition for rehearing was denied by the same vote, and rehearing en banc was denied because no poll of the judges was requested. *Id.* at 17.

6. Petitioner applied to the Chief Justice for a stay of removal pending the resolution of his certiorari petition and the Chief Justice denied the application. No. 07A430 (Dec. 14, 2007). Petitioner re-filed the stay application with Justice Kennedy, who referred it to the Court, and the Court denied the application on February 19, 2008.

ARGUMENT

Petitioner contends (Pet. 10-19) that the court of appeals erred in denying his application for a stay of removal and dismissing his petition for review. The court of appeals correctly denied petitioner's stay request, because petitioner could not satisfy either the 8 U.S.C. 1252(f)(2) standard or the traditional standard for granting a preliminary injunction, which in turn has been applied to the granting of a stay. The court of appeals also correctly dismissed the petition for review, because petitioner's fact-bound claim does not raise a "question[] of law" over which the court of appeals retained jurisdiction under 8 U.S.C. 1252(a)(2)(D). The

court of appeals' brief, unpublished order does not conflict with any decision of this Court or any other court of appeals. Moreover, because the unpublished order does not establish circuit precedent, it would not in any event give rise to the sort of conflict between precedential decisions of courts of appeals that would warrant this Court's review. And the fact that the court of appeals did not set forth its reasoning in its order makes this case a particularly inappropriate candidate to review the questions presented. Accordingly, the petition should be denied. Indeed, the Chief Justice and then the full Court have already denied petitioner's application for a stay of removal, which raised the same arguments. There is no reason for a different disposition of the certiorari petition itself.

1. Petitioner first contends (Pet. 10-12) that review is warranted because the courts of appeals disagree about the standard for determining when to issue a stay of removal pending resolution of a petition for review. Although petitioner is correct that the courts of appeals have disagreed about the appropriate standard, this case is not a suitable vehicle for resolving that disagreement, because the court of appeals did not expressly choose between the two possible standards in this case and because petitioner is not entitled to a stay under either standard.

a. There is disagreement in the courts of appeals regarding which standard governs a request for a stay of removal pending the resolution of a petition for review. In opposing petitioner's stay in the Fourth Circuit, the government contended that the applicable standard is contained in 8 U.S.C. 1252(f)(2), which states that "no court shall enjoin the removal of any alien * * * unless the alien shows by clear and convincing

evidence that the entry or execution of such order is prohibited as a matter of law." See, *e.g.*, Gov't C.A. Mot. to Dismiss 9.[2] The Eleventh Circuit agreed with that position in *Weng* v. *United States Attorney General*, 287 F.3d 1335, 1337-1340 (2002) (per curiam). In contrast, a number of courts of appeals have held that the Section 1252(f)(2) standard does not apply to requests for temporary stays of removal pending appellate review. See *Tesfamichael* v. *Gonzales*, 411 F.3d 169, 171-176 (5th Cir. 2005), cert. denied, 128 S. Ct. 353 (2007); *Hor* v. *Gonzales*, 400 F.3d 482, 483-485 (7th Cir. 2005); *Douglas* v. *Ashcroft*, 374 F.3d 230, 233-234 (3d Cir. 2004); *Arevalo* v. *Ashcroft*, 344 F.3d 1, 8-9 (1st Cir. 2003); *Mohammed* v. *Reno*, 309 F.3d 95, 98-99 (2d Cir. 2002); *Bejjani* v. *INS*, 271 F.3d 670, 687-688 (6th Cir. 2001), abrogated on other grounds by *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006); *Andreiu* v. *Ashcroft*, 253 F.3d 477, 480-482 (9th Cir. 2001) (en banc).[3] Those courts evaluate stay requests under the traditional standard for granting preliminary injunctive relief, which considers the

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[2] The government has pointed out that an "injunction" "command[s] or prevent[s] an action," *Black's Law Dictionary* 788 (7th ed. 1999), and granting a stay of removal prevents removal of the alien from the United States. See also *Weng* v. *United States Att'y Gen.*, 287 F.3d 1335, 1337-1338 (11th Cir. 2002) (per curiam) (discussing definition of "stay" as "a kind of injunction") (quoting *Black's Law Dictionary* 529 (6th ed. 1990)). Further, application of Section 1252(f)(2) to stays of removal is consistent with Congress's purpose in enacting IIRIRA, which was to ensure prompt removal of illegal aliens from the United States. See, *e.g.*, *Weng*, 287 F.3d at 1340 n.10 (quoting *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-482, 486 (1999)); S. Rep. No. 249, 104th Cong., 2d Sess. 7 (1996).

[3] Petitioner includes (Pet. 11) the Tenth Circuit's decision in *Lim* v. *Ashcroft*, 375 F.3d 1011, 1012 (2004), but the Tenth Circuit in that case did not explicitly address the issue of whether Section 1252(f)(2) applies to stays pending appeal.

applicant's likelihood of success on the merits; whether irreparable harm would occur if a stay is not granted; whether that potential harm outweighs the harm to the government if a stay is not granted; and whether granting a stay would serve the public interest. See, *e.g.*, *Tesfamichael*, 411 F.3d at 172.

b. This case would be a poor vehicle for resolving that disagreement because the Fourth Circuit has not taken a position on which standard applies, and it did not do so in this case. Before the court of appeals, petitioner acknowledged that the Fourth Circuit "has not yet squarely resolved this issue in a published decision." Appl. C.A. Pet. for Reh'g En Banc 13. In its order denying petitioner's stay motion, the court of appeals simply stated that "[t]he motion for stay of deportation is denied," without stating what standard it used. Pet. App. 1. The court likely believed that it did not need to resolve that question because, as the government explained, petitioner could not prevail under either the Section 1252(f)(2) standard or the traditional injunctive relief standard. See Gov't Mot. to Dismiss 9-16.

Petitioner points to nothing in the court of appeals' order that indicates it actually applied the Section 1252(f)(2) standard; instead, he simply assumes it must have done so because, in his view, he would satisfy the more lenient standard. Pet. 8-9. Because the Fourth Circuit did not adopt the Section 1252(f)(2) standard in this case, much less do so in a published decision that would create circuit precedent on the issue, this case is not a suitable vehicle for resolving the question of the appropriate standard.

c. Review is also unwarranted because, as explained in the government's opposition to the stay application (at 13-15), petitioner could not prevail under either the Sec-

tion 1252(f)(2) standard or the traditional injunctive relief standard. See *Kenyeres* v. *Ashcroft*, 538 U.S. 1301, 1305-1306 (2003) (Kennedy, J., in chambers) (noting the disagreement in the circuits but concluding that it would not be appropriate to review the issue in that case because "[a]pplicant is unlikely to prevail in his request for a stay under either of the standards adopted by the Courts of Appeals"). Petitioner has never attempted to satisfy the Section 1252(f)(2) standard by providing clear and convincing evidence that his removal is "prohibited as a matter of law," and he cannot do so. 8 U.S.C. 1252(f)(2); see Gov't C.A. Mot. to Dismiss 9-11. Petitioner instead contends, in cursory fashion, that he merits a stay of removal under the more lenient injunctive relief standard because the IJ found that he would be tortured if removed to Jamaica. Pet. 9.

Petitioner cannot satisfy the traditional standard for injunctive relief. He did not show a likelihood of ultimate success on the merits of his CAT claim, because the BIA correctly reversed the IJ's finding that petitioner met his burden of demonstrating a likelihood of torture with government acquiescence. Pet. App. 4-6. As the BIA explained, petitioner did not establish a basis for concluding that Jamaica's laws prohibiting physical intimacy were routinely enforced, and thus petitioner did not establish that it was more likely than not that he would be arrested and prosecuted, much less tortured, under those laws. *Ibid.* (citing *In re M-B-A-*, 23 I. & N. Dec. 474 (B.I.A. 2002)). Further, as the BIA noted, petitioner did not show that any harms that might befall him would be with government acquiescence, particularly because the Jamaican government has prosecuted those who commit violence against homosexuals and has taken steps to curtail violence by prison guards. *Id.* at 4, 6.

Petitioner has made no attempt to explain why the court of appeals would overturn the BIA's conclusions.

Further, petitioner has not demonstrated under the traditional standard that the balance of the equities and the public interest warranted a stay. Although petitioner claims he will be tortured if removed to Jamaica (Pet. 9), the BIA rejected that claim. Pet. App. 4-6. Moreover, even if petitioner were to be removed from the United States prior to the adjudication of his petition, he could continue to pursue his petition from abroad. See, *e.g.*, *Obale* v. *Attorney Gen.*, 453 F.3d 151, 160 n.9 (3d Cir. 2006). And there would be harm to the government, and the public interest, in staying the order of removal. Petitioner has been found removable, and as this Court has noted, the government has a "weighty" interest in efficient administration of the immigration laws. *Landon* v. *Plasencia*, 459 U.S. 21, 34 (1982). A stay of removal would also harm the government and the public interest by requiring additional expenditures of public funds for detention of the alien (or, if he is released, for monitoring his whereabouts). See *Sofinet* v. *INS*, 188 F.3d 703, 708 (7th Cir. 1999). That harm would be particularly pronounced here, as petitioner has an extensive history of criminal activity in the United States. Pet. App. 13-14; see pp. 4-5, *supra*. Petitioner therefore does not merit a stay of removal even under the traditional injunctive relief test.

Regardless of which standard the court of appeals used, its decision was correct. This case therefore is not an appropriate vehicle for deciding whether the Section 1252(f)(2) standard applies to a motion to stay removal pending resolution of a petition for review.

2. Petitioner also contends (Pet. 12-19) that the court of appeals erred in concluding that it lacked jurisdiction

to review his fact-bound claim that he would be tortured with government acquiescence if returned to Jamaica. In petitioner's view, any challenge to "the application of law to facts" raises a "question[] of law" within the meaning of 8 U.S.C. 1252(a)(2)(D). Pet. 12-13. Petitioner is mistaken. Further, the decision below does not conflict with any decision of this Court or any other court of appeals, and review is not warranted because petitioner would not prevail on his CAT claim even if the federal courts had jurisdiction to review it. Moreover, the court of appeals' brief, unpublished decision would not be an appropriate vehicle for resolving the question presented, because the court did not provide an explanation for why it dismissed the petition for review.

a. The court of appeals correctly determined that it did not have jurisdiction to review petitioner's claim. Under 8 U.S.C. 1252(a)(2)(C), a court lacks jurisdiction to review an order of removal for an alien who is removable by reason of having been convicted of certain criminal offenses, including aggravated felony offenses. See, *e.g.*, *Mbea* v. *Gonzales*, 482 F.3d 276, 278 n.1 (4th Cir. 2007). Petitioner was found removable and was removed due to, *inter alia*, an aggravated felony. See A.R. 293; see also p. 4, *supra*. After petitioner illegally reentered the United States, DHS determined that petitioner was subject to removal through reinstatement of the prior order of removal. See 8 U.S.C. 1231(a)(5); see also p. 5, *supra*. Section 1252(a)(2)(C) thus generally bars federal-court review of petitioner's removal order.

The exception for "questions of law" contained in 8 U.S.C. 1252(a)(2)(D) does not apply here. The BIA's decision to deny CAT protection was a fact-based determination. See Pet. App. 4-6. In reversing the IJ's finding that petitioner would be tortured if returned to Ja-

maica, the BIA ruled that the IJ's determination was "based on a series of unsupported suppositions" and was not supported by the record evidence. *Id.* at 4. The BIA recounted how the evidence petitioner provided was insufficient to meet his burden under a well-settled, uncontested legal standard. *Id.* at 5-6. And the BIA repeatedly noted that the reason petitioner's claim failed was that he failed to present key evidence in support of his claim. See, *e.g.*, *id.* at 4 ("the *record does not establish* that it is more likely than not that any torture [petitioner] may suffer in Jamaica would be by or at the acquiescence of the government") (emphasis added); *id.* at 4-5 ("there is *little evidence*" regarding "the extent to which [laws prohibiting homosexuality] [are] enforced") (emphasis added); *id.* at 5 ("the *record does not establish* that it is more likely than not that, if arrested and imprisoned, [petitioner] would be tortured by or at the acquiescence of the Jamaican government") (emphasis added).

Although petitioner now denies that he is seeking judicial review of the BIA's factual findings, his petition urges exactly that. See Pet. 17-18 (arguing that the BIA erred in finding no likelihood that petitioner would be tortured in Jamaica with government acquiescence in light of petitioner's "voluminous evidence" to the contrary). Petitioner seeks to have a federal court give more weight to his evidence than the agency did, and that type of claim falls outside the INA's limited exception for legal and constitutional questions. See, *e.g.*, *Torres de la Cruz* v. *Maurer*, 483 F.3d 1013, 1019 n.5 (10th Cir. 2007) ("'Questions of law' pertain to 'those issues that were historically reviewable on habeas—constitutional and statutory-construction questions, not dis-

cretionary or factual questions.'" (quoting H.R. Conf. Rep. No. 72, 109th Cong., 1st Sess. 175 (2005)).

Petitioner's contention (Pet. 12-13) that any application of law to undisputed facts raises a "question[] of law" is mistaken. The REAL ID Act and its legislative history make clear that Congress intended to preclude review of both agency findings of historical facts and agency determinations that result from the agency's weighing and evaluation of the evidence in determining whether the alien has met his evidentiary burden. See, *e.g.*, H.R. Conf. Rep. No. 72, *supra*, at 175 ("When a court is presented with a mixed question of law and fact, the court should analyze it to the extent there are legal elements, but should not review any factual elements."); *id.* at 175-176 ("Factual questions include those questions that courts would review under the 'substantial evidence' * * * standard."). Under petitioner's view, the courts of appeals could review all agency determinations in cases in which the historical facts are undisputed. That approach would make the term "questions of law" lose all meaning and would seriously undermine Congress's goal of limiting judicial review of agency removal determinations.

Petitioner's contention (Pet. 17) that he raises a legal claim by arguing that the BIA "committed clear legal error by applying an incorrect standard of review" of the IJ's decision does not merit review. As an initial matter, this claim is not properly before the Court, because petitioner did not raise it in the court of appeals until his petition for rehearing en banc, and the court of appeals never addressed the claim. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992); *Joseph* v. *Blair*, 488 F.2d 403, 404 (4th Cir. 1973) (per curiam), cert. denied, 416 U.S. 955 (1974).

In any event, the claim lacks merit. The brief filed by the government with the BIA specifically stated that the applicable standard of review was the "clearly erroneous" standard, see Gov't BIA Br. 2 (quoting 8 C.F.R. 1003.1(e)(6)(v)), and contended that the IJ's determination that it was more likely than not that petitioner would be tortured was clearly erroneous, *ibid.* Nor did the BIA purport to apply *de novo* review in its decision. Rather, the BIA simply found that the evidence was manifestly insufficient to support the IJ's findings, Pet. App. 4-6, as it was entitled to do under clear-error review. See, *e.g.*, *Belortaja* v. *Gonzales*, 484 F.3d 619, 624 (2d Cir. 2007). For example, the BIA found "little evidence" (Pet. App. 4-5) that Jamaica's law prohibiting homosexual conduct is enforced, and it relied on the BIA's decision in *In re M-B-A-*, 23 I. & N. Dec. 474, 475-480 (2002), which had found a similar flaw in a torture claim because it was based on "conjecture" and a "chain of assumptions," *id.* at 478-479. In any event, absent a firm basis for concluding that the BIA failed to apply the clear-error standard, its decision is entitled to a presumption of regularity. See, *e.g.*, *Kamara* v. *Attorney Gen.*, 420 F.3d 202, 212 (3d Cir. 2005).[4]

[4] Petitioner also contends (Pet. 18-19) that he was denied due process because the BIA determined that he did not adduce sufficient evidence to support his CAT claim. That claim is not properly before the Court, because petitioner did not raise any due process claim before the BIA or the court of appeals, and neither addressed such a claim. See, *e.g.*, *Williams*, 504 U.S. at 41. Moreover, petitioner's claim amounts to a disagreement with the BIA's weighing of the evidence in his particular case, and such a claim does not warrant this Court's review. In any event, the argument lacks merit, because although the Due Process Clause entitled petitioner to a "fair [removal] hearing," *Tun* v. *Gonzales*, 485 F.3d 1014, 1025 (8th Cir. 2007), petitioner received the process he was due: he had a hearing before an IJ, who permitted him to present evidence and arguments. The BIA reviewed the evidence

b. Petitioner contends (Pet. 13-16) that the courts of appeals disagree on whether a claim like his raises a question of law under 8 U.S.C. 1252(a)(2)(D). Petitioner is mistaken. Like the court below, several courts of appeals have concluded that an alien's challenge to the agency's determination that he has not set forth sufficient facts to demonstrate CAT eligibility does not raise a "question[] of law." See, *e.g.*, *Hanan* v. *Gonzales*, 449 F.3d 834, 837 (8th Cir. 2006) (no judicial review of claim that alien was improperly denied CAT relief because "[t]hese are challenges to factual determinations"); *Boakai* v. *Gonzales*, 447 F.3d 1, 5 (1st Cir. 2006) (no judicial review of claim "that the BIA was wrong in rejecting the CAT claim"); *Hamid* v. *Gonzales*, 417 F.3d 642, 647-648 (7th Cir. 2005) (no judicial review of question whether the agency "correctly considered, interpreted, and weighed the evidence presented" in determining the likelihood of torture, which is an unreviewable "factual" question). Just as in those cases, petitioner's claim here that he likely would be tortured in Jamaica with government acquiescence is a fact-bound determination, not a question of law.

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petitioner presented and determined that, on the record he developed, petitioner did not meet his burden of demonstrating that it was more likely than not that he would be tortured by or with the acquiescence of the Jamaican government. Pet. App. 4-6.

Petitioner does not dispute that he received the process he was due; instead, he claims an entitlement to a certain outcome, apparently because different aliens seeking different forms of relief on different records received relief from removal. See Pet. 9, 18-19. That is not a due process claim, for due process guarantees that a certain process be followed, not that a certain outcome be reached. *E.g.*, *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 768 (3d Cir.), cert. denied, 493 U.S. 821 (1989).

Petitioner cites (Pet. 15-16) two cases in which courts of appeals have found "questions of law" in the context of CAT determinations. Neither of those courts considered a claim like petitioner's, *i.e.*, that the agency merely erred in its assessment of the evidence. In *Toussaint* v. *Attorney General*, 455 F.3d 409, 412 n.3, 415-416 (3d Cir. 2006), and *Jean-Pierre* v. *Attorney General*, 500 F.3d 1315, 1322 (11th Cir. 2007), the courts of appeals concluded that the question whether a particular course of conduct amounts to "torture" under the CAT is a reviewable legal question. In contrast to those cases, here there is no argument about what constitutes torture as a legal matter; instead, petitioner simply contends that the evidence shows a likelihood that he would be subjected to torture.[5] This case thus does not implicate any conflict in the circuits that would warrant review.

c. Even if the court of appeals erred in finding that it lacked jurisdiction to review petitioner's claim, further review would not be warranted because petitioner would

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[5] Petitioner also cites (Pet. 14) *Chen* v. *Department of Justice*, 471 F.3d 315 (2d Cir. 2006), for the proposition that a CAT claim like his is reviewable, but that case is wholly inapposite. It addressed a challenge to an IJ's determination that the alien did not demonstrate changed or extraordinary circumstances to excuse an untimely asylum application, not a CAT claim. *Id.* at 330. The court's dicta noted that it had found a CAT claim reviewable on habeas corpus in a case decided prior to the REAL ID Act, which concentrated review in the courts of appeals under the jurisdictional limitations in 8 U.S.C. 1252(a)(2), see 471 F.3d at 331 n.10, and therefore says nothing about whether certain CAT claims are reviewable after the REAL ID Act.

The other pre-REAL ID Act cases petitioner cites (Pet. 13)—*Singh* v. *Ashcroft*, 351 F.3d 435 (9th Cir. 2003), and *Ogbudimkpa* v. *Ashcroft*, 342 F.3d 207 (3d Cir. 2003)—are similarly inapposite because they do not address the scope of judicial review allowed by 8 U.S.C. 1252(a)(2)(D). See, *e.g.*, *Kamara*, 420 F.3d at 209 (recognizing that the REAL ID Act "radically overhauled" the relevant "jurisdictional framework").

not succeed on his challenge to the agency's denial of CAT deferral. As the BIA correctly found, petitioner's claim was "based on a series of unsupported suppositions," and thus he could not meet his burden of showing that it was likely that Jamaica's laws prohibiting intimacy between men would be enforced, that he would be imprisoned, that he would be tortured while in prison, or that if he did experience torture it would occur with government acquiescence. Pet. App. 4-6. If the court of appeals had jurisdiction to review petitioner's claim, it would do so under the "substantial evidence" standard, *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992), and the agency's factual determinations would be "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. 1252(b)(4)(B). In light of the deficiencies in petitioner's evidence noted by the BIA, the record plainly does not compel a finding that it is more likely than not that petitioner would be tortured with government acquiescence if returned to Jamaica. Further review of petitioner's fact-bound claim is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 07-1169

In The Supreme Court of the United States

PAUL ANTHONY RANGOLAN,

Petitioner,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL,

Respondent.

On Petition for A Writ of Certiorari
To the United States Court of Appeals
For The Fourth Circuit

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Petitioner, Paul Anthony Rangolan submits the following in reply to Respondent's Brief in Opposition:

1. Since the filing of the Petition, the jurisdictional landscape has significantly changed with the issuance on May 8 of the precedent decision from the Board of Immigration Appeals (Board or BIA), in *Matter of V-K-*, 24 I & N Dec. 500 (BIA May 8, 2008). *See also Matter of A-S-B-*, 24 I. & N. Dec. 493 (BIA May 8, 2008) (companion case regarding asylum).[1] In *Matter of V-K-*, the BIA squarely held, contrary to Respondent's position here, that aliens do *not* raise factual claims when they challenge whether, on the historical facts of their case, they satisfied the CAT "more likely than not" standard. (The two BIA decisions are attached here as Addendums.)

As in Mr. Rangolan's case, the alien in *Matter of V-K-* argued that, on the historical facts of the case, he satisfied the CAT "more likely than not" legal standard. The Board explained that although the historical facts were subject to the clear error standard of review, it reviewed de novo mixed questions regarding the application of the "more likely than not" legal standard to the historical facts of the case. The Board thus stated that it reviewed de novo whether the facts of a case were sufficient "to meet the [alien] respondent's burden of proof for protection under the Convention Against Torture."

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[1] Respondent's brief in opposition was filed on May 14, 2008, but did not address the BIA's decisions dated May 8, 2008.

Matter of V-K-, 24 I & N Dec. at 502. The Board further stated that it would "appear essential to the performance of our appellate function as contemplated by the Attorney General that we possess the authority to review de novo findings deemed by an Immigration Judge (IJ) to satisfy an ultimate statutory standard." *Ibid.*[2]

In Mr. Rangolan's case, the BIA overturned the CAT grant by the IJ and did so without expressly indicating what standard of review it was employing, and specifically whether it viewed Mr. Rangolan's claim as factual, subject to the clear error standard. But from the BIA's cursory decision, it is plain that the Board could not have found clear error and that it did not review the CAT grant based on a clearly erroneous standard of review. Yet the Fourth Circuit dismissed the case for lack of jurisdiction, accepting the government's view that the claim was *factual* and thus did not fall within 8 U.S.C. 1252(a)(2)(D)'s reference to "questions of law." Mr. Rangolan was thus whipsawed, with his claim being treated by the Fourth Circuit as factual but by the BIA as subject to *de novo* review.

Respondent understandably does not contend that the same claim can be characterized one way in

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[2] In the companion case, *Matter of A-S-B-*, the BIA addressed the same question regarding the applicable standard of review but in the context of an asylum claim. *See* 24 I & N Dec. at 497 ("The question whether these uncontested facts were sufficient to establish a well-founded fear of persecution . . . was a legal determination that was not subject to the clearly erroneous standard of review.").

the BIA and then an opposite way in the court of appeals. Instead, Respondent contends that the Court should *assume* that the BIA treated Mr. Rangolan's claim as factual and that it viewed the IJ's decision as clearly erroneous. Respondent maintains that this assumption is warranted because the correct standard of review at the Board was the clearly erroneous standard and that, in the absence of a contrary statement in the decision, the Court should presume that the BIA acted correctly. Opp. Br. at 17 (stating that the BIA is entitled to a "presumption of regularity").

Yet now, in light of *Matter of V-K-*, it is clear that the BIA does treat claims like Mr. Rangolan's as subject to de novo review, and not as *factual* challenges subject to the clearly erroneous standard. Thus, if the presumption of regularity governs, the Court must assume that the BIA treated Mr. Rangolan's claim as subject to de novo review. That is also consistent with a proper reading of the Board's decision in Mr. Rangolan's case, which certainly did not explain why the IJ was *clearly* erroneous.

The BIA's recent decision thus strongly supports granting the Petition. Alternatively, the Court should grant the Petition, vacate the Fourth Circuit's decision, and remand with instructions that the court of appeals send the case back to the BIA for clarification on the standard employed by the Board in Mr. Rangolan's case. Indeed, in both *Matter of V-K-* and *Matter of A-S-B-*, the courts of appeals – at the suggestion of the government – remanded the cases to obtain clarification on the

standard employed by the BIA in CAT and asylum cases. At a minimum, the Court should defer consideration of the Petition and direct Respondent to file a response to *Matter of V-K-* (and the companion case *Matter of A-S-B-*).

2. Respondent argues that there is no disagreement among the courts of appeals regarding jurisdiction to review whether an alien's facts satisfy the "more likely than not" standard. That is incorrect. In addition to the cases cited in the Petition, other decisions have reviewed the type of CAT claim raised by Petitioner here. *See DeAlmeida v. Attorney General*, No. 05-3453, 2007 WL 2050870, at **2 (3d Cir. June 18, 2007); *Badewa v. Attorney General*, No. 06-2858, 2007 WL 3193841, at **4 (3d Cir. Oct. 30, 2007). *See also Arteaga v. Mukasey*, 511 F.3d 940, 948-49 (9th Cir. 2007) ("Weighing the evidence, the IJ and the BIA agreed that Arteaga did not meet his burden of showing that more likely than not he would be tortured at the hands of the El Salvadoran government if removed. The evidence in the record does not compel a contrary result.").

Moreover, there is widespread general disagreement over the meaning of the term "questions of law" in Section 1252(a)(2)(D). *Compare, e.g., Jimenez Viracacha v. Mukasey*, 518 F.3d 511, 515 (7th Cir. 2008), *pet. for cert. filed* Apr. 30, 2008 (finding that Section 1252(a)(2)(D) covers only "pure" questions of law), *with Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 331 & n.11 (2d Cir. 2006) (concluding that Section 1252(a)(2)(D) "undeniably can encompass claims of 'erroneous

application or interpretation of statutes'") (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)); *Ramadan v. Gonzales*, 479 F.3d 646, 648 (per curiam) (holding that the court's jurisdiction over "questions of law" "includes not only 'pure' issues of statutory interpretation, but also application of law to undisputed facts"), *reh'g en banc denied*, 504 F.3d 973 (9th Cir. 2007) .

3. Respondent also argues that the pre-REAL ID Act habeas cases are irrelevant. In support of that position, respondent cites *Kamara v. Attorney General,* 420 F.3d 202 (3d Cir. 2005), for the proposition that the REAL ID Act "'radically overhauled' the relevant 'jurisdictional framework.'" Opp. Br. at 19 n.5. But *Kamara* was specifically discussing only the fact that the REAL ID Act transferred review from the district courts to the courts of appeals. Indeed, *Kamara* stated the scope of review under the REAL ID Act, and specifically 8 U.S.C. 1252(a)(2)(D), "mirrors" the scope of review previously available in habeas. *Kamara*, 420 F.3d at 210-11.

Nor can there be any serious question that the reference to "questions of law" in Section 1252(a)(2)(D) was not intended to eliminate any review previously available in habeas. Indeed, Respondent quotes approvingly from a Tenth Circuit decision making that precise point. Opp. Br. at 15-16. *See also Chen*, 471 F.3d at 326-27.

4. Respondent notes that the Fourth Circuit granted the government's jurisdictional motion to dismiss without an opinion. But the Fourth Circuit

has now spelled out its jurisdictional reasoning in *Saintha v. Mukasey*, 516 F.3d 243 (4th Cir. 2008), *reh'g en banc denied.*

5. Respondent contends (at 16) that Petitioner waived an ancillary argument regarding the court of appeal's jurisdiction to review the BIA's standard of review. But whatever the force of that waiver argument, Petitioner's central argument – which he has consistently pressed -- is that his CAT claim raises a legal challenge for purposes of review by the court of appeals under 8 U.S.C. 1252(a)(2)(D). In his *en banc* Petition, Petitioner elaborated on that argument by noting that it was highly unlikely the BIA actually employed a "clear error" standard given its failure to say so and the cursory nature of its opinion. In any event, the BIA in *Matter of V-K-* has now clarified that, contrary to Respondent's position, it does not view the type of CAT claim raised by Mr. Rangolan as factual.

6. Finally, Respondent seeks to minimize the merits of Mr. Rangolan's CAT claim. Opp. Br. at 19-20. Yet the IJ granted him CAT and the BIA's two-page decision overturning the IJ's decision was cursory and unreasoned. Indeed, the BIA itself subsequently found in another case that Jamaica has a horrendous record of abusing homosexuals. The government's suggestion that the cases had different records misses the larger point made by the subsequent BIA decision, which is that in general homosexuals are not safe in Jamaica because of government policies and acquiescence in brutal conduct. Pet. at 9 (discussing the subsequent BIA CAT decision). If anything, Mr. Rangolan faces

far worse danger because he is suffering from AIDS. For the same reason, Respondent's contention that Mr. Rangolan would not have qualified for a stay under the ordinary preliminary injunction standard is incorrect.[3]

CONCLUSION

The Petition should be granted. However, if the Court concludes that full review is premature at this time, it should grant, vacate and remand to the court of appeals, with instructions to obtain clarification on the standard of review employed by the BIA in Mr. Rangolan's case. Alternatively, consideration of the Petition should be deferred and the Court should direct Respondent to file a response to the BIA's May 8 decision in *Matter of V-K-*. Finally, if the Court does not adopt any of the foregoing options, it should hold this Petition until it disposes of the petition in *Jimenez Viracacha v. Mukasey*, No. 07-1363, which raises the same threshold question regarding the meaning of "questions of law" in 8 U.S.C. 1252(a)(2)(D).

[3] Moreover, on the stay issue and Mr. Rangolan's equities, Respondent fails to note Petitioner's significant cooperation with the government. Indeed as noted by AUSA Ann Carroll in her letter dated September 26, 2006, "[h]ad Mr. Rangolan not come forward, the government may never have known of the jury tampering or the plot to kill the eyewitness in the Ellis/Fortson murder case.... Because of Mr. Rangolan's cooperation, the government has successfully prosecuted five individuals who are currently serving substantial sentences." Pet's Opp. to Govt. Mot. To Dismiss, Exh. F (4th Cir.).

Respectfully submitted,

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ADDENDUM A

Cite as 24 I&N Dec. 493 (BIA 2008)
Interim Decision #3608

Matter of A-S-B-, Respondent
Decided May 8, 2008
U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

(1) Under 8 C.F.R. § 1003.1(d)(3) (2008), the Board of Immigration Appeals should defer to the factual findings of an Immigration Judge, unless they are clearly erroneous, but it retains independent judgment and discretion, subject to applicable governing standards, regarding pure questions of law and the application of a particular standard of law to those facts.
(2) In determining whether established facts are sufficient to meet a legal standard, such as "well-founded fear," the Board has the authority to weigh the evidence in a manner different from that accorded by the Immigration Judge, or to conclude that the foundation for the Immigration Judge's legal conclusions was insufficient or otherwise not supported by the evidence of record.

FOR RESPONDENT: Christopher J. Stender, Esquire, San Francisco, California
FOR THE DEPARTMENT OF HOMELAND SECURITY: Deborah K. Goodwin, Assistant Chief Counsel
BEFORE: Board Panel: OSUNA, Acting Chairman; HOLMES and GRANT, Board Members.

OSUNA, Acting Chairman:

In an order dated October 16, 2007, the United States Court of Appeals for the Ninth Circuit granted the Government's unopposed motion to remand the respondent's case to the Board. Upon review of our prior decisions pursuant to the court's order, we will again dismiss the respondent's appeal.

I. FACTUAL AND PROCEDURAL HISTORY

The respondent is a native and citizen of Guatemala who illegally entered the United States in 1990. On December 12, 2003, an Immigration Judge found him removable as charged and granted him asylum. The decision fully discusses the respondent's claim, which we briefly summarize here. In 1989, the respondent worked as a gas station attendant in Guatemala. One day, two truckloads of guerrillas approached him at work and demanded free gas under *494 the threat of kidnaping and forced recruitment or other consequences. The respondent complied and the guerrillas departed. The respondent was too scared to return to work and left for the United States the following year. The respondent feared that upon return to Guatemala, he would be harmed by guerrillas as a result of the 1989 incident, and by the military because he did not report for compulsory military service when eligible in 1986. He also feared that authorities would discover the 1989 incident and persecute him as a suspected guerrilla or guerrilla supporter.

The Immigration Judge found that the respondent did not establish past persecution, or a well-founded fear of persecution, related to the guerrillas or like forces. He did conclude, however, that the respondent would likely be singled out for persecution by the military in Guatemala because the authorities would question him upon his return, discover the 1989 incident, and mistreat him as a result. The Immigration Judge considered evidence in the record from the Department of State indicating that Guatemalan security forces engaged in serious human rights abuses. The Department of Homeland Security ("DHS") filed an appeal, emphasizing the lack of objective evidence in the record to support the Immigration Judge's grant of asylum.

In a decision dated November 19, 2004, we agreed with the Immigration Judge that the respondent did not experience past persecution on account of any protected ground. We did not, however, concur that the respondent established a reasonable possibility that he would face persecution from the military upon return to Guatemala. Rather, we agreed with the DHS that the Immigration Judge's conclusion that the authorities would discover the 1989 incident and single the respondent out for persecution on this basis was purely speculative. We also considered the evidence of record that the Guatemalan civil war ended in 1996, and that the politically motivated violence feared by the respondent had abated. We pointed out that the respondent had not provided countervailing evidence to show that his fear remained reasonable despite these conditions. The record was remanded for the Immigration

Judge to address the respondent's request for withholding of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10, 1984, G.A. Res. 39/46. 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) ("CAT"). *See* 8 C.F.R. § 1208.16 (2004).

On remand, the Immigration Judge, without objection from the parties, considered the facts established at the prior hearing, as well as updated evidence of country conditions provided by the DHS. In a decision dated October 6, 2005, he concluded that the respondent did not meet his burden of proof under the CAT that it was more likely than not that he would be tortured upon return to Guatemala and granted him voluntary departure. The *495 respondent filed an appeal which raised several matters, including his assertion that in our November 19, 2004, decision, we did not review the Immigration Judge's findings of facts under the clearly erroneous standard of review and that we engaged in improper fact-finding on appeal.

We dismissed the appeal in a decision dated October 5, 2006, explaining that we had utilized the correct standard of review in our prior decision because we concluded, as a matter of law, that the facts of the respondent's case did not establish a well-founded fear of persecution within the meaning of the Immigration and Nationality Act. Insofar as the respondent contended that he did not have an adequate opportunity to rebut the evidence of country conditions referred to in our decision, we responded that the pertinent evidence, namely

reports issued by the State Department, had been in the record at the time of his hearing.[1]

The respondent filed a petition for review with the Court of Appeals for the Ninth Circuit. On October 16, 2007, the court, without any specific directives, granted the Government's unopposed motion to remand, which requested a remand to

> allow the Board to provide clarification and elaboration on the scope of review it employed (in its November 19, 2004 decision reversing the immigration judge's grant of asylum) to review the question of whether [the respondent] demonstrated a well-founded fear of persecution in Guatemala. Specifically, remand will allow the Board an opportunity to clarify and elaborate on its characterization (in its October 5, 2006 decision) of the ultimate "well-founded fear" issue as presenting a question of law warranting a *de novo* standard of review pursuant to 8 C.F.R. § 1003.1(d)(3)(ii) (2007).

II. STANDARD AND SCOPE OF REVIEW

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[1]The respondent also asserted that the Government had the burden of showing that country conditions had changed to a degree that undermined his claim of a well-founded fear. Although the Government carries this burden of proof when past persecution has been established, there was no such finding in this case. *See* 8 C.F.R. § 1208.13(b)(1)(ii) (2008); *see also Matter of D-I-M-*, 24 I&N Dec. 448 (BIA 2008). Therefore, the burden of proof to establish asylum eligibility rested squarely with the respondent. *See* 8 C.F.R. § 1208.13(a).

In 2002, the Attorney General issued a procedural reforms regulation, which, in part, related to the standard of review applied by the Board and the scope of its review of decisions by the Immigration Judges. *See* Board of Immigration Appeals: Procedural Reforms To Improve Case Management, *496 67 Fed. Reg. 54,878 (Aug. 26, 2002). The provision entitled "Scope of review" stated the following:

> (i) The Board will not engage in *de novo* review of findings of fact determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.
>
> (ii) The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo.*
>
> (iii) The Board may review all questions arising in appeals from decisions issued by Service officers *de novo.*
>
> (iv) Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in factfinding in the course of deciding appeals. A party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand. If further factfinding is needed in a particular case, the Board may remand the proceeding

> to the immigration judge or, as appropriate, to the Service.

67 Fed. Reg. at 54,902 (codified at 8 C.F.R. § 3.1(d)(3), which was transferred to 8 C.F.R. § 1003.1(d)(3) in 2003); *see also Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002).[2]

The Supplementary Information to this regulation contained an extensive discussion about the interplay of the clearly erroneous standard of review and the Board's de novo review authority.[3] It explained that the Board should defer to the factual findings of an Immigration Judge, unless they are clearly erroneous, but that it retains independent judgment and discretion, subject to applicable governing standards, regarding pure questions of law and the application of a particular standard of law to those facts. 67 Fed. Reg. at 54,888-89 (Supplementary Information). The clearly erroneous standard therefore does not apply to the application of legal standards, such as whether the facts established by an alien "amount to 'past persecution' or a 'wellfounded fear of persecution.'" *Id.* at 54,890. This analytical approach to deciding cases recognizes that the Immigration Judges are better positioned to discern credibility and assess

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[2] The clearly erroneous standard of review in 8 C.F.R. § 1003.1(d)(3)(i) applies to appeals filed on or after September 25, 2002, and the remaining sections of the regulation apply to appeals pending on that date. *See Matter of S-H-*, *supra*, at 464 n.2.

[3] Legal determinations made by the Attorney General in the Supplementary Information to a rule are binding on the Board. *See Matter of A-A-*, 20 I&N Dec. 492, 502 (BIA 1992); *see also* 67 Fed. Reg. at 54,884 n.4 (Supplementary Information).

the facts with witnesses before them, but that the Board is better positioned to resolve issues involving the application of legal standards and the exercise of discretion. *Id.*

The Attorney General provided specific examples to show how the standard of review should be applied. For example, the Immigration Judge's *497 assessment of what happened to an asylum applicant is a factual determination that will be reviewed under the clearly erroneous standard. *See* 67 Fed. Reg. at 54,890 (Supplementary Information). The questions whether the facts demonstrate harm that rises to the level of persecution and whether the harm was inflicted "on account of" a protected ground, however, "are questions that will not be limited by the 'clearly erroneous' standard." *Id.* In the context of an application for cancellation of removal, the facts that a respondent alleges to support a claim of "exceptional and extremely unusual hardship" to a relative and to establish the status of that person as a qualifying relative are reviewed by the Board only to determine if the Immigration Judge's finding was clearly erroneous. *Id.* After the Board has determined that the Immigration Judge's findings regarding the facts underlying the hardship claim are not clearly erroneous, it may review de novo whether the facts support a conclusion that the hardship rises to the required level. *Id.* Similarly, the Board may review de novo the question whether a favorable exercise of discretion is warranted in a given case. *See Noble v. Keisler*, 505 F.3d 73 (2d Cir. 2007) (holding that the Board has the authority to reach a different result on discretion than that reached by the Immigration Judge).

III. APPLICATION OF THE REGULATIONS

In this case, the Immigration Judge found in his December 12, 2003, decision that the respondent presented credible testimony. We did not find this determination to be "clearly erroneous." The predicate facts presented by the respondent, namely what happened to him when he was in Guatemala, were the basis for our decision when we evaluated the respondent's case on appeal. The question whether these uncontested facts were sufficient to establish a well-founded fear of persecution, however, was a legal determination that was not subject to the clearly erroneous standard of review. This mode of evaluation is in accord with the standard for review set out in 8 C.F.R. § 1003.1(d)(3) and explicated in the Supplementary Information published in the Federal Register. This is why we characterized the well-founded fear finding as a "matter of law" in our prior decision. *See Recinos De Leon v. Gonzales*, 400 F.3d 1185, 1194 (9th Cir. 2005) (stating that on remand, the Board may decide legal issues in the case based on the respondent's testimony, which was to be taken as true).

In determining whether established facts are sufficient to meet a legal standard, such as "well-founded fear," the Board is entitled to weigh the evidence in a manner different from that accorded by the Immigration Judge, or to conclude that the foundation for the Immigration Judge's legal conclusions was insufficient or otherwise not supported by the evidence of record. In this vein, we found in our November 19, 2004, decision that the

*498 Immigration Judge's legal conclusion that the respondent established a well-founded fear was not supported by the facts of record. Rather, the Immigration Judge rested his conclusion on speculative findings about what may or may not occur to the respondent in the future. This is not fact-finding, because, among other reasons, it is impossible to declare as "fact" things that have not yet occurred. *Cf. Huang v. U.S. INS*, 421 F.3d 125, 129 (2d Cir. 2005) (finding that in the absence of solid support in the record for the alien's assertion that he will be subject to persecutory action upon return to his native country, his fear is speculative at best); *see also Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006) (finding that a CAT claim cannot be granted by stringing together a series of suppositions). We therefore conclude that we acted within our authority in determining that the Immigration Judge's finding of a well-founded fear was not supported by the record and that the respondent did not meet his burden of proof to satisfy the legal requirements for asylum.

We further find that neither of our prior decisions in this case violated the prohibition against fact-finding on appeal, as set out in 8 C.F.R. § 1003.1(d)(3)(iv). We relied on the predicate facts found by the Immigration Judge and did not evaluate any "new" evidence submitted on appeal. The State Department information discussed in our November 19, 2004, decision regarding the end of the civil war in Guatemala had been admitted into evidence at the hearing without objection by the respondent. The Immigration Judge's failure to explicitly discuss the end of the civil war and related issues in his decision did not render our

mention of them to be improper fact-finding on appeal, especially considering that the end of the war is an uncontested event.[4] Were we to treat the matter otherwise, we would be precluded from considering the total content of any documentary evidence submitted before the Immigration Judge unless the entire document was read into the Immigration Judge's decision. We find no indication that this was the Attorney General's intention when the procedural reforms regulations were promulgated. *See Rotinsulu v. Mukasey*, 515 F.3d 68, 73 (1st Cir. 2008) (finding that 8 C.F.R. § 1003.1(d)(3)(iv) was not intended to restrict the Board's power to weigh and evaluate evidence already presented before the Immigration Judge). *499

III. CONCLUSION

In conclusion, for the reasons stated in our prior decisions in this case, we find that the respondent did not establish as a matter of law that he should be granted asylum or withholding of removal under either the Act or the CAT. Accordingly, upon clarification of our prior decisions, the respondent's appeal will again be dismissed.

ORDER: The appeal is dismissed.

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[4] We also properly found that the portions of the State Department report discussing the end of the civil war were more persuasive in relation to the respondent's claim than those concerning general human rights violations, on which the Immigration Judge focused in finding that the respondent met his burden of proof for asylum.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS). *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the DHS, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

ADDENDUM B

Cite as 24 I&N Dec. 500 (BIA 2008)
Interim Decision #3609

Matter of V-K-, Respondent
Decided May 8, 2008
U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

The Board of Immigration Appeals reviews de novo an Immigration Judge's prediction or finding regarding the likelihood that an alien will be tortured, because it relates to whether the ultimate statutory requirement for establishing eligibility for relief from removal has been met and is therefore a mixed question of law and fact, or a question of judgment.

FOR RESPONDENT: Thomas E. Moseley, Esquire, Newark, New Jersey
FOR THE DEPARTMENT OF HOMELAND SECURITY: Bruce B. Dizengoff, Assistant Chief Counsel
BEFORE: Board Panel: FILPPU, COLE, and PAULEY, Board Members.
PAULEY, Board Member:

In a decision dated April 27, 2004, an Immigration Judge granted the respondent's request for deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10, 1984, G.A. Res. 39/46. 39 U.N. GAOR Supp.

No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) ("Convention Against Torture"). The Department of Homeland Security ("DHS") appealed the decision of the Immigration Judge.[1] On August 4, 2006, we sustained the DHS's appeal and ordered the respondent removed from the United States to Ukraine. The respondent appealed our decision to the United States Court of Appeals for the Third Circuit, in whose jurisdiction this case arises.

On September 10, 2007, the Third Circuit granted the Government's unopposed motion to remand proceedings to the Board. In its remand, the Third Circuit instructed us to specify whether we had the authority under 8 C.F.R. § 1003.1(d)(3) to reverse the Immigration Judge's determination that "'there [was] a preponderance of evidence in the record leading to a justification for a clear probability finding that this particular respondent, as *501 a Jewish refugee from the former Soviet Union generally, and the Ukraine specifically, is likely to be targeted at least in part, by both governmental and non-governmental entities within the Ukraine should he be removed to that country . . . [and that such mistreatment will rise to the level of torture].'" In addition, the court asked us to specify whether we had authority to affirmatively find that the petitioner had failed to show a clear probability that he would be tortured if he returned to Ukraine or

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[1]We note that this case involved additional proceedings relating to questions of the respondent's removability that are not relevant to the issues discussed in this decision.

that the torture would occur by or with the acquiescence of government officials.

In his decision, the Immigration Judge credited the testimony of the respondent's expert witness that the respondent "is likely to need to come into contact with governmental entities and is likely to be a target for extortion and mistreatment that is likely to rise to the level of torture." We now clarify that while we reviewed the Immigration Judge's factual rulings for clear error, we do not consider a prediction of the probability of future torture to be a ruling of "fact." Although predictions of future events may in part be derived from "facts," they are not the sort of "[f]acts determined by the Immigration Judge" that can only be reviewed for clear error. 8 C.F.R. § 1003.1(d)(3)(i) (2008).

According to the regulations prescribing the Board's scope of review, facts found by an Immigration Judge can be reviewed only to determine if they are "clearly erroneous," but the Board "may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo*." 8 C.F.R. §§ 1003.1(d)(3)(i)-(ii). Furthermore, the regulatory history surrounding the regulations, which were promulgated in 2002, indicates that there was no intent to apply the restrictive "clearly erroneous" test to mixed questions of fact and law where the so-called "fact" consists of a finding as to the degree of possibility of a result occurring that is necessary to sustain a statutory basis for eligibility (e.g., the extent of hardship or the chance of persecution or torture if the alien is removed). Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 Fed. Reg. 54,878

(Aug. 26, 2002). The comments accompanying the regulations explain, for example, that "[t]he 'clearly erroneous' standard does not apply to determinations of matters of law, nor to the application of legal standards, in the exercise of judgment or discretion. This includes judgments as to whether the facts established by a particular alien amount to 'past persecution' or a 'well founded fear of persecution.'" *Id.* at 54,890 (Supplementary Information). Accordingly, we conclude that an Immigration Judge's prediction or finding regarding the likelihood that an alien will be tortured may be reviewed de novo because, like a conclusion relating to whether a statutorily prescribed chance of persecution or level of hardship *502 exists, it relates to whether the ultimate statutory requirement for establishing eligibility for relief was met and is therefore a mixed question of fact and law, or a question of "judgment." 8 C.F.R. § 1003.1(d)(3)(ii).[2]

In reviewing the record, we disagreed with the Immigration Judge's mixed factual and legal determination that a preponderance of the evidence showed that it was more likely than not that the

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[2] The fact that the Immigration Judge's prediction derived from his acceptance of an expert witness's testimony does not affect its nature as a prediction relating to whether an ultimate legal standard, here the likelihood of torture, has been met. Indeed, our conclusion that a de novo standard applies here is supported by the nature of expert witness opinion evidence itself. As reflected in Rule 702 of the Federal Rules of Evidence, such expert opinion testimony, while undoubtedly a form of evidence, does not purport to be evidence as to "fact" but rather is admissible only if "it will assist the trier of fact to understand the evidence or to determine a fact in issue."

respondent would be tortured in the Ukraine, as that term has been interpreted by Board and Third Circuit case law. In so doing, we did not find any facts ourselves but only assessed the facts as found by the Immigration Judge and established by the evidence entered into the record, determining that they were insufficient to meet the respondent's burden of proof for protection under the Convention Against Torture. We believe that we acted in accordance with the relevant regulations and our role as an appellate body. 8 C.F.R. § 1003.1(d)(3). Indeed, it would appear essential to the performance of our appellate function as contemplated by the Attorney General that we possess the authority to review de novo findings deemed by an Immigration Judge to satisfy an ultimate statutory standard.

Accordingly, upon clarification of our prior decision, we will again sustain the DHS's appeal, dismiss the respondent's appeal, and order the respondent removed from the United States.

ORDER: The appeal of the Department of Homeland Security is sustained.

FURTHER ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: The respondent is ordered removed from the United States to Ukraine.